

Fall 2002

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Recommended Citation

Lori A. Kosakowski, *The Inclusion of Passive Migration Under CERCLA Liability: When is "Disposa" Truly Disposal?*, 37 Val. U. L. Rev. 293 (2002).

Available at: <https://scholar.valpo.edu/vulr/vol37/iss1/12>

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THE INCLUSION OF PASSIVE MIGRATION UNDER CERCLA LIABILITY: WHEN IS "DISPOSAL" TRULY DISPOSAL?

I. INTRODUCTION

Environmental contamination has played a large role in the history of our country. The Old West was founded and developed on the principle that the land existed to serve the people and that the resources it provided were limitless.¹ Innocent actions such as mining and smelting, which were the lifeblood of the Western way of life, have made lasting impacts on the environment, including contamination of surface and groundwater, that resulted in not only aesthetic unpleasanties but have also caused potentially deadly problems such as highly toxic heavy metals being carried in the drainage systems.² Today, even more devastating cases of environmental contamination confront our Nation, and, as a consequence, Congress has taken a more active role in trying to solve these problems.³

Part of the legislative solution was the passage of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), which was conceived to handle problems of hazardous

¹ See Susan R. Poulter, *Cleanup and Restoration: Who Should Pay?*, 18 J. LAND RES. & ENVTL. L. 77, 77 (1998). Mining and smelting played large roles in the development of the West, but both left lasting toxic signs. *Id.* After the gold, silver, lead, and copper had all been extracted, the miners moved on to new areas where there were more minerals to be had. *Id.* The Mineral Policy Center estimates that there are 560,000 abandoned or inactive hardrock mining sites in the United States, 15,000 of which are exhibiting contamination problems. *Id.*

² *Id.* This flow of heavy metals affects wetlands, irrigation water, agricultural crops, and domestic and wild animals, in addition to humans. *Id.* Apart from the water damage, smelting plants caused damage through air emissions that have contaminated surrounding land and neighborhoods. *Id.*

³ See Molly A. Meegan, *Municipal Liability for Household Hazardous Waste: An Analysis of the Superfund Statute and its Policy Implications*, 79 GEO. L.J. 1783, 1783 (1991). In the United States, over 43,000 chemical substances are in commercial production, and over 1000 new chemical compounds are created each year. *Id.* "The Environmental Protection Agency has estimated that the United States produces 600 pounds of hazardous waste per person per year," and more than ninety percent of that waste is disposed of in an environmentally unsound way. *Id.* This waste is not only a product of industry. *Id.* American households produced approximately 160 million tons of municipal waste in 1989, and much of this waste was disposed of in municipal landfills and then ignored. *Id.* Municipal landfills account for twenty percent of the sites slated for cleanup under CERCLA. *Id.* at 1784.

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waste disposal.⁴ Unfortunately, due to the Act's lack of legislative history and its ambiguous language, several disputes have arisen over the interpretation of CERCLA.⁵ One of these disputes concerns the interpretation of the term "disposal" as it is used in the liability provisions of CERCLA. This scenario arises when an owner of a property improperly disposes of hazardous waste on the land. A second owner, unaware that the property is contaminated, then purchases the land and eventually sells the land to a third owner. The question becomes whether the waste that spread through the land during the second owner's possession is considered "disposal" under CERCLA.⁶ Federal courts are split on the issue, with some courts advocating an active interpretation of the term, where parties are only held liable if they actively contributed to the contamination of a property.⁷ Other courts advocate a passive interpretation, where parties are held liable for waste that spreads through the property during their ownership, even if they had no active role in the initial contamination.⁸ This split has caused

⁴ See Robert L. Bronston, Note, *The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 MICH. L. REV. 609 (1994); Robin C. Irwin, Note, *United States v. CDMG Realty Co.: Rejecting CERCLA's Previous Owner Liability for Passive and Active Disposal on Motion for Summary Judgment*, 23 N. KY. L. REV. 147, 148-49 (1995); Craig May, Note, *Taking Action—Rejecting the Passive Disposal Theory of Prior Owner Liability Under CERCLA*, 17 VA. ENVTL. L.J. 385 (1998).

⁵ May, *supra* note 4, at 385. "CERCLA has spawned a tremendous amount of litigation . . ." *Id.*; see VALERIE M. FOGLEMAN, HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION: A COMPREHENSIVE GUIDE TO SUPERFUND LAW xv (1992). Because of the complexity and ambiguity of CERCLA, it provides dubious guidance to people and entities who are trying to avoid liability. FOGLEMAN, *supra*.

⁶ See Patrick D. Traylor, Comment, *Liability of Past Owners: Does CERCLA Incorporate a Causation-Based Standard?*, 35 S. TEX. L. REV. 535, 543 (1994). "Passive disposal requires only that hazardous waste already present at the facility move, through no action of the past owner, into the environment during that person's ownership." *Id.*; see also Catherine S. Stempien, *Sins of Omission, Commission, and Emission: Does CERCLA's Definition of "Disposal" Include Passive Activities?*, 9 J. ENVTL. L. & LITIG. 1, 4 (1994). "Passive disposal is a tremendous problem because it leads to groundwater contamination and contamination of property that abuts the initial dumping site." Stempien, *supra*. This spreading of contamination increases the time and cost of cleaning up and increases the risk of damage to natural resources. *Id.*

⁷ See *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996); *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346 (N.D. Ill. 1992).

⁸ See *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 227 F.3d 1196 (9th Cir. 2000); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992); see also Bronston, *supra* note 4, at 610 (discussing the division between the federal courts over the scope of liability of prior owners). See generally Joseph Lipinski, Comment, *Last Owner Liability for Passive Migration Under CERCLA*, 7 DICK. J. ENVTL. L. & POL'Y 97 (1998) (analyzing the circuit split over the definition of "disposal" under CERCLA).

problems for many landowners.⁹ People who once owned property, but who sold it months, or even years ago, are finding themselves liable under CERCLA for property cleanup costs.¹⁰ Because the courts have been unable to give a uniform answer about who, as a prior owner, is liable under CERCLA, countless individuals and entities have been left to guess about the extent of their liability should contamination ever be discovered at a facility they once owned.

This Note will discuss the current controversy surrounding the interpretation of the word "disposal" in CERCLA's liability provision. Part II discusses the incidents leading up to and the passage of CERCLA, including the problems that the ambiguous legislative history of the Act has caused.¹¹ Part II further examines the liability provision of CERCLA in relation to the Act's broad remedial purpose and discusses the controversy surrounding the interpretation of the word "disposal."¹² Part III presents the arguments on both sides of the controversy, including case law analysis and statutory interpretations used by each side to defend its position.¹³ Part IV analyzes these arguments and demonstrates why the active/passive way of looking at the word "disposal" is ineffective and creates unnecessary confusion.¹⁴ Part V proposes a more effective way to determine liability under CERCLA in an attempt to eliminate the controversy surrounding the use of the word "disposal:" instead of looking at "disposal" as active or passive, the word should create liability based on the act or omission of a party.¹⁵

II. BACKGROUND: UNDERSTANDING CERCLA

Congress enacted CERCLA in response to a perceived problem with the disposal of hazardous waste.¹⁶ The statute was designed to ensure that hazardous waste disposed of in the past would not become an

⁹ See J.B. Ruhl, *The Plight of the Passive Past Owner: Defining the Limits of Superfund Liability*, 45 SW. L.J. 1129, 1144 (1991). The indecision that has resulted from these cases has caused uncertainty for countless past owners. *Id.*

¹⁰ *Id.* at 1130.

¹¹ See *infra* Part II.

¹² See *infra* Part II.

¹³ See *infra* Part III.

¹⁴ See *infra* Part IV.

¹⁵ See *infra* Part V.

¹⁶ JOHN S. APPLEGATE ET AL., *THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTES* 869 (2000). See generally Alex C. Geisinger, *From the Ashes of Kelley v. EPA: Framing the Next Step of the CERCLA Lender Liability Debate*, 4 DUKE ENVTL. L. & POL'Y F. 41 (1994) (discussing the reasons for enacting CERCLA).

environmental disaster in the future.¹⁷ One of the first hazardous waste incidents to draw public attention to the hazardous waste disposal problem occurred in Love Canal, New York.¹⁸ Between 1942 and 1953, Hooker Chemical Company dumped more than 21,000 tons of chemical waste on an abandoned site, eventually covering the site with earth and clay in 1953.¹⁹ Hooker Chemical then sold the site to the Niagara Falls Board of Education for one dollar, and a school and playground were built on the premises.²⁰ Developers turned the surrounding area into a residential neighborhood, but, in the early 1970s, homeowners began to notice a foul odor.²¹ When an increase in rainfall caused the level of groundwater to rise, "thick, oily sludge" began to seep into basements and to accumulate on the ground.²² Health problems—including birth

¹⁷ APPELATE, *supra* note 16, at 869; *see also* FOGLEMAN, *supra* note 5, at 1. The primary purpose of CERCLA was to enable the federal government to swiftly clean up abandoned and uncontrolled hazardous waste sites. FOGLEMAN, *supra* note 5, at 1. The secondary purpose was to make persons who were responsible for the improper disposal of hazardous waste pay the cost of cleanup. *Id.*

¹⁸ ANALYZING SUPERFUND ECONOMICS, SCIENCE, AND LAW 4-5 (Richard L. Revesz & Richard B. Stewart eds., 1995) [hereinafter SUPERFUND ECONOMICS]; *see* United States v. Hooker Chem. & Plastic Corp., 850 F. Supp. 993 (W.D.N.Y. 1994). In 1979, New York and the United States brought a recovery suit against Hooker Chemical Company for the costs of cleaning up the Love Canal site. *Hooker Chem. Corp.*, 850 F. Supp. at 997; *see also* Michael S. Caplan, *Escaping CERCLA Liability: The Interim Owner Passive Migration Defense Gains Circuit Recognition*, 28 ENVTL. L. REP. 10121, 10122 (1998) (discussing the political climate at the time CERCLA was created).

¹⁹ SUPERFUND ECONOMICS, *supra* note 18, at 4-5; *see Hooker Chem. Corp.*, 850 F. Supp. at 1010. Hooker Chemical began using Love Canal as a disposal site around 1941. *Hooker Chem. Corp.*, 850 F. Supp. at 1004. Hooker Chemical deepened and widened the canal for waste disposal. *Id.* at 1007. They generally gathered 500-2000 drums of waste before hauling them to Love Canal, which occurred about once a month. *Id.* at 1008. The chemical waste, which was composed of both liquid and solid chemicals, was usually stored in 55-gallon metal drums. *Id.* The drums were used or reconditioned and were described by some witnesses as rusty and leaking. *Id.* The drums were covered on the same day they were dumped, although some drums usually remained uncovered at the end of the day. *Id.* at 1009. On occasion, when a drum broke open, workers would be splashed and burned by the chemicals or have holes burned in their clothing. *Id.*

²⁰ SUPERFUND ECONOMICS, *supra* note 18, at 4-5. *See generally* MAXINE I. LIPELES, ENVIRONMENTAL LAW, HAZARDOUS WASTE 276 (3d ed. 1997) (describing the contamination of Love Canal by Hooker Chemical Company).

²¹ SUPERFUND ECONOMICS, *supra* note 18, at 5; *see Hooker Chem. Corp.*, 850 F. Supp. at 1018. The case quotes residents of Love Canal describing explosions of highly flammable chemicals at the waste site and burning debris being launched into roads in the residential neighborhood. *Hooker Chem. Corp.*, 850 F. Supp. at 1017. In addition, other residents told stories of children playing with exposed drums of hazardous material and others who described a rash or burning sensation after they swam in the canal. *Id.* at 1018.

²² SUPERFUND ECONOMICS, *supra* note 18, at 5. In addition to the sludge, in 1976, high levels of insecticide were detected in fish from Lake Ontario, and this was traced to the

defects, miscarriages, epilepsy, and liver abnormalities—appeared among residents near Love Canal.²³ A public emergency was declared, and the media began to broadcast the issue nationally, increasing the awareness and concern of the public.²⁴

Besides Love Canal, other events highlighting the problems associated with hazardous waste disposal occurred, including the toxic spill of pesticides into the James River in Virginia,²⁵ the "Valley of the Drums" incident in Kentucky,²⁶ the contamination of the Hudson River with polychlorinated biphenyl ("PCB"),²⁷ and the ingestion of PBB by livestock in Michigan.²⁸ These and other mishaps provoked a legislative response to the problems affiliated with hazardous waste disposal.

contamination at Love Canal. *Id.*; see *Hooker Chem. Corp.*, 850 F. Supp. at 1006. The rainfall caused the groundwater to rise because the area was characterized as having poor drainage and a fluctuating water table. *Hooker Chem. Corp.*, 850 F. Supp. at 1006.

²³ Meegan, *supra* note 3, at 1784-85 n.13.

²⁴ SUPERFUND ECONOMICS, *supra* note 18, at 5. The health commissioner's report on Love Canal was entitled, "Love Canal: Public Health Time Bomb." *Id.*; see *Hooker Chem. Corp.*, 850 F. Supp. at 1069. At the trial, the court concluded that the State failed to prove by a preponderance of the evidence that Hooker Chemical Company's actions displayed reckless disregard for the safety of others and that all of its actions comported with the available knowledge and industry practice at the time. *Hooker Chem. Corp.*, 850 F. Supp. at 1069. Therefore, the court did not award punitive damages. *Id.*

²⁵ Meegan, *supra* note 3, at 1784-85 n.13 (describing the contamination of the James River as occurring when a small chemical plant dumped Kepone wastes into the river and caused a loss of a two-million-dollar-per-year harvest of seafood); see also APPELATE, *supra* note 16, at 678. See generally *Allied-Signal, Inc. v. Comm'r of Internal Revenue*, 63 T.C.M. (CCH) 2672 (1992) (defining Kepone as a highly toxic chemical pesticide that is also a possible carcinogen to humans). Kepone has neurological effects like DDT. APPELATE, *supra* note 16, at 678.

²⁶ SUPERFUND ECONOMICS, *supra* note 18, at 5 (describing the "Valley of the Drums" incident where tens of thousands of barrels of "discarded, leaking, and unlabeled wastes" were dumped in a meadow in Kentucky).

²⁷ SUPERFUND ECONOMICS, *supra* note 18, at 5; see also Meegan, *supra* note 3, at 1784-85 n.13 (describing the contamination of the Hudson River as being caused by General Electric dumping polychlorinated biphenyls ("PCBs") into the river, causing the river to be closed to commercial fishing in the 1970s). See generally *United States v. Commonwealth Edison Co.*, 620 F. Supp. 1404, 1406-07 (N.D. Ill. 1985) (defining PCBs, which are primarily used by electric utilities in their transformers, as toxic and persistent in the environment).

²⁸ SUPERFUND ECONOMICS, *supra* note 18, at 5; see APPELATE, *supra* note 16, at 677-78. PBB, a fire retardant chemical, was accidentally mixed with cattle feed. APPELATE, *supra* note 16, at 678. Farmers drank and sold contaminated milk before they discovered the problem, and 25,000 dairy cows had to be killed. *Id.*

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A. CERCLA: A Legislative History

Congress responded to the hazardous waste disposal problem by passing CERCLA. President Jimmy Carter signed CERCLA into law on December 11, 1980,²⁹ and the statute was amended by the Superfund Amendments and Reauthorization Act ("SARA") in 1986.³⁰ Considered during the final days of a lame duck Congress, CERCLA was quickly negotiated and passed by a Senate concerned about sacrificing work already expended on the legislation.³¹ Similarly, the House of Representatives considered the legislation under a suspension of the rules.³²

Due to the accelerated process that Congress used to pass CERCLA, little legislative history exists, and that which does is ambiguous.³³

²⁹ Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 35 (1982); see also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1037 (2d Cir. 1985). See generally LIPELES, *supra* note 20, at 278 (discussing the enactment of CERCLA).

³⁰ Kristin M. Carter, Note, *Superfund Amendments and Reauthorization Act of 1986: Limiting Judicial Review to the Administrative Record in Cost Recovery Actions by the EPA*, 74 CORNELL L. REV. 1152, 1152 (1989). The Superfund Amendments and Reauthorization Act ("SARA") was signed into law by President Reagan on October 17, 1986. *Id.* SARA was enacted to deal with the problems of CERCLA, such as improper political conduct by EPA officials and the awareness that the hazardous waste problem was larger than Congress first anticipated. *Id.* To deal with these problems, Congress, through SARA, wanted to define cleanup standards, expand the resources available to the EPA to clean up and investigate, and clarify the authority of the EPA. *Id.* SARA also provided \$8.5 billion to the EPA over five years to clean up hazardous waste sites. *Id.*; see William W. Balcke, Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 133 (1988). SARA is a set of reforms for CERCLA, including issues such as cleanup standards, federal-state relations, and rules of litigation. Balcke, *supra*. SARA also provides concrete settlement guidelines for disputes under CERCLA. *Id.*

³¹ Grad, *supra* note 29, at 19. On the floor of the Senate, during discussion of the compromised legislation, Senator Humphrey "took the opportunity to comment on the pressure and rush with which this legislation was being adopted" and that the National Association of Manufacturers would be supportive of the bill except that they did not like the "circumstances in which the legislation was being considered." *Id.* at 26; see also APPLEGATE, *supra* note 16, at 886 (explaining how CERCLA was passed as a last minute compromise with virtually no debate); FOGLEMAN, *supra* note 5, at 2 (discussing how there was no Senate, House, or Conference report to help explain the actions of the legislature).

³² Grad, *supra* note 29, at 29-30. A suspension of the rules means that bills must be passed as they are received and no amendments are allowed. *Id.*; see also FOGLEMAN, *supra* note 5, at 13 (describing how the members of the House complained that the Senate had left them with a "massive badly- and inadequately-drafted legislation on a take-it-or-leave-it basis").

³³ Grad, *supra* note 29, at 2; see also *Artesian Water Co. v. Gov't of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) (criticizing CERCLA for lack of clarity and precision and for

Many lower courts have commented that CERCLA has "a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history."³⁴ This lack of legislative history adds to the difficulty that exists in interpreting the statute and "discerning the full meaning of the law."³⁵ CERCLA has also been criticized as "excessively stringent and costly" and regarded as an inefficient program plagued by high transaction costs and long delays.³⁶

B. Liability Under CERCLA

CERCLA has two broad remedial purposes: (1) facilitating the cleanup of hazardous waste sites and (2) ensuring that those responsible for pollution pay the costs of cleanup.³⁷ Congress accomplished the first goal, facilitating hazardous waste cleanup, by authorizing the President to respond to releases and by establishing the "Superfund" to pay for

its inartful drafting and numerous ambiguities due to its rapid passage); APPELATE, *supra* note 16, at 886. "The result [of the hurried passage of the statute] was unclear draftsmanship and very little legislative history." APPELATE, *supra* note 16, at 886. See generally FOGLEMAN, *supra* note 5, at xv (describing CERCLA as complex and ambiguous and claiming that it provides little guidance to people and entities that are trying to avoid liability).

³⁴ ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE COMPENDIUM I-1 (1992); see APPELATE, *supra* note 16, at 886. Judges have found the statute to be so vague that they have assumed that Congress intended the courts, by their decisions, to create federal common law to supplement the statute. APPELATE, *supra* note 16, at 886.

³⁵ Grad, *supra* note 29, at 2; see *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) (describing the congressional intent of CERCLA as difficult to discern with precision due to its lack of clarity and poor draftsmanship).

³⁶ SUPERFUND ECONOMICS, *supra* note 18, at 3-4. In reality, the annual cost to the EPA of CERCLA is between three and five billion dollars, which is a fraction of the cost spent on air and water pollution regulation. *Id.*; see Balcke, *supra* note 30, at 124. Much of CERCLA's perceived ineffectiveness is due to the immense scope of the problem that it is dealing with. Balcke, *supra* note 30, at 124. Recently, the number of uncontrolled hazardous waste sites has been estimated between 1500 and 10,000, and cleanup costs have been estimated at \$10 to \$100 billion. *Id.* In addition, litigation may be extremely costly and time-consuming due to the large number of Potentially Responsible Parties ("PRPs") involved. *Id.*; see also Carter, *supra* note 30, at 1156 (discussing EPA's average cost of cleanup of a site in 1988 as between \$21 and \$30 million).

³⁷ See SUPERFUND ECONOMICS, *supra* note 18, at 6; Caplan, *supra* note 18, at 10125. An example of this breadth is the language of the liability scheme of CERCLA, which was intended to be "extensive and far-reaching." SUPERFUND ECONOMICS, *supra* note 18, at 6; see also *United States v. CDMG Realty Co.*, 96 F.3d 706, 717 (3d Cir. 1996); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992); Irwin, *supra* note 4, at 147 (relaying the importance of assigning cleanup costs because the approximate cost of cleaning up a CERCLA site is between \$500 and \$750 billion); Lipinski, *supra* note 8, at 104 (discussing the two primary purposes of CERCLA).

cleanup.³⁸ Congress secured the second goal, making responsible parties pay for the cleanup, through CERCLA's liability provision.³⁹ CERCLA defines four groups of people as "Potentially Responsible Parties" ("PRPs") and holds them liable for the cleanup of hazardous waste sites.⁴⁰ Congress intended liability under CERCLA to be strict and retroactive, as well as joint and several.⁴¹ However, under CERCLA, a

³⁸ Balcke, *supra* note 30, at 123; see APPELLEGATE, *supra* note 16, at 873. The Superfund is a revolving trust fund that is used to finance government directed cleanup efforts, to pay claims arising from the cleanup of private parties who are not liable as PRPs, and to compensate federal and state government agencies for damage to natural resources caused by the hazardous waste site. APPELLEGATE, *supra* note 16, at 873. The money in the Superfund is used primarily for sites that are included on the National Priorities List ("NPL"), which includes the worst hazardous waste sites in the country. *Id.*; see also FOGLEMAN, *supra* note 5, at 1. The Superfund was created to help promote the primary purpose of CERCLA: to enable the government to clean up hazardous waste sites. FOGLEMAN, *supra* note 5, at 1. The money can be used to investigate, abate, and clean up hazards created by abandoned and uncontrolled hazardous waste sites. *Id.*

³⁹ Balcke, *supra* note 30, at 123.

⁴⁰ 42 U.S.C. § 9607(a) (2000). These PRPs include:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

Id.; see Steven B. Bass, Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879, 884 (1987).

⁴¹ SUPERFUND ECONOMICS, *supra* note 18, at 6-7. Strict liability means that no fault or negligence is necessary for liability. *Id.* Retroactive liability means that deposits that were placed before CERCLA was enacted can be the basis for liability. *Id.* Joint and several liability holds each party responsible for the cost of the entire cleanup of the site. *Id.* PRPs are joint and severally liable if the harm at the site is sufficiently commingled to make it impossible to determine which wastes were responsible for the release. *Id.* The burden of proof is on the PRP to show that the costs are divisible, thereby eliminating the joint and several liability. *Id.* Under a strict liability scheme, a PRP "cannot avoid liability by showing that it met the regulatory or common law standards of care applicable at the time that it engaged in the activity, or even that it was also complying with hazardous waste regulatory standards currently in force." *Id.*; see Grad, *supra* note 29, at 22 ("The standard of liability was still intended to be a standard of strict liability."); Bronston, *supra* note 4, at

PRP can sue for contribution if forced to pay for the full cost of cleanup.⁴² A private party seeking to initiate a cost-recovery action must prove four elements.⁴³ First, the private party must show a release or threatened release of a hazardous substance.⁴⁴ Second, the party must show that the release was from a "facility" as defined by CERCLA.⁴⁵ Third, the release or threatened release must have caused the plaintiff to incur necessary response costs that were consistent with the National Contingency Plan.⁴⁶ Fourth, the defendant must be within one of four statutory classes of PRPs.⁴⁷

609 ("CERCLA imposes both strict liability and joint and several liability . . ."); *see also* *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992); *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988); *Redwing Carriers, Inc. v. Saraland Apts.*, 875 F. Supp. 1545, 1568 (S.D. Ala. 1995); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59 (W.D. Mo. 1984).

⁴² SUPERFUND ECONOMICS, *supra* note 18, at 7. The PRP who paid the full cleanup costs can require other PRPs to pay their equitable share, but the available parties must absorb the shares of parties who are insolvent or cannot be located at the time of cleanup. *Id.* It is common for numerous parties to be insolvent or not located due to the significant periods of time that often pass before the site is cleaned. *Id.*

⁴³ Lieutenant Colonel Connelly, *Ninth Circuit Holds that "Disposal" Includes Passive Migration Under CERCLA Section 107*, 2000 ARMY LAW. 18 (2000); *see also* T aylor, *supra* note 6, at 540-41 (discussing the four essential elements needed to prove liability under CERCLA).

⁴⁴ 42 U.S.C. § 9601(22) (2000). "Release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or depositing into the environment . . ." *Id.*; *see* 42 U.S.C. § 9601(9); APPLEGATE, *supra* note 16, at 957-58. There are three ways that a substance can be deemed hazardous. APPLEGATE, *supra* note 16, at 957-58. First, 42 U.S.C. § 9601(14) sets out a list of hazardous materials under CERCLA. *Id.* Second, 42 U.S.C. § 9602(a) allows the EPA administrator to designate as a hazardous substance any substance that, when released into the environment, may present a substantial danger to public health, welfare, or the environment. *Id.* Finally, a substance can be deemed hazardous if it is composed of a mixture of a hazardous and non-hazardous substances, if somewhere in the mixture there is a CERCLA hazardous waste. *Id.*

⁴⁵ 42 U.S.C. § 9601(9).

"Facility" is defined as (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id.

⁴⁶ *See* APPLEGATE, *supra* note 16, at 892-93. The National Contingency Plan ("NCP") is the master plan that governs the cleanup of hazardous waste sites. *Id.* It establishes procedures and standards for responding to the release of hazardous substances,

CERCLA provides three defenses to liability.⁴⁸ PRPs are not liable if the release or threatened release of the hazardous substance resulted from an act of God, an act of war, or an act or omission of a third party.⁴⁹ A fourth defense, the innocent purchaser defense, was added by SARA in 1986.⁵⁰ This defense can be asserted if, at the time of purchase, the

pollutants, and contaminants. *Id.* The methodology of the NCP includes identifying the sites that are most in need of remediation, analyzing the risks to human health and the environment, setting requirements for state and community involvement in decision-making, selecting cost-effective remedies, guiding remedial actions using Superfund money, and setting standards for judging the extent and scope of site cleanup. *Id.*; see also 42 U.S.C. § 9607(a)(4)(A) (2000) (explaining that response costs cannot be recovered by PRPs if the remedial action is inconsistent with the NCP). See generally 42 U.S.C. § 9605 (2000) (establishing the NCP in CERCLA).

⁴⁷ *Id.* § 9607(a); see *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 227 F.3d 1196, 1202 (9th Cir. 2000); see also *Connelly*, *supra* note 43, at 18.

⁴⁸ 42 U.S.C. § 9607(b)(1)-(3); see *Bass*, *supra* note 40, at 884-85.

⁴⁹ 42 U.S.C. § 9607(b)(1)-(3); see *id.* § 9601(1). An act of God is defined as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." 42 U.S.C. § 9601(1); *FOGLEMAN*, *supra* note 5, at 226. The defendant must prove by a preponderance of the evidence that the act of God was the sole cause of the release or threatened release. *FOGLEMAN*, *supra* note 5, at 226. Likewise, in order to assert the second defense, an act of war, the defendant must show by a preponderance of the evidence that the sole cause of the release or threatened release was the act of war. *Id.* at 227. A showing of proximate cause is not sufficient. *Id.*; see also 42 U.S.C. § 9607(b)(3). In order for a PRP to assert the third defense of an act or omission of a third party, the defendant must assert by a preponderance of the evidence that the release or threatened release of a hazardous substance and the damages resulting therefrom were caused solely by

an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607(b)(3); *SUPERFUND ECONOMICS*, *supra* note 18, at 6-7. The defenses to liability are very limited, and the only one that has been of any significance is the third-party defense. *SUPERFUND ECONOMICS*, *supra* note 18, at 6-7. And even in this case, the significant limitations that are placed on it have lead to very few cases where it has been successfully established. *Id.*

⁵⁰ 42 U.S.C. § 9601(35). The defense is established if

(A) the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the

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defendant did not know, and had no reason to know, that a hazardous substance was disposed of at the facility.⁵¹

Liability under CERCLA is triggered when response costs are incurred because of the release or threatened release of a hazardous substance into groundwater, surface water, soil, or air.⁵² A "release" is defined under CERCLA as "any spilling, leaking, pumping, pouring,

circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of, on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnations.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the proceeding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id. See *supra* note 49 for the requirements of § 9607(b)(3).

⁵¹ 42 U.S.C. § 9601(35). See generally FOGLEMAN, *supra* note 5, at 229 (discussing the innocent purchaser defense).

⁵² SUPERFUND ECONOMICS, *supra* note 18, at 6; see also 42 U.S.C. § 9607(a)(4). The PRPs will be held liable for

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

any other necessary costs of response incurred by any other person consistent with the national contingency plan;

damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a)(4).

emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)."⁵³ Once a release, or a substantial threat of a release occurs, the Environmental Protection Agency ("EPA") has two remedial options.⁵⁴ The EPA can use Superfund money to pay for cleanup of the site and then file suit to recover costs from the PRP, or the EPA can issue an administrative or court order that requires the PRP to assume the response costs.⁵⁵

C. CERCLA: A Disposal Controversy

Recently, a controversy has developed regarding one of the categories of PRPs.⁵⁶ The section at issue concerns the liability of any person, *who at the time of disposal, owned or operated a facility*.⁵⁷ The

⁵³ 42 U.S.C. § 9601(22).

⁵⁴ See APPLGATE, *supra* note 16, at 872 (discussing the steps that can be taken by the federal government to clean up hazardous wastes sites under CERCLA); Balcke, *supra* note 30, at 128 (describing the enforcement procedures that the EPA is authorized to take); see also Bass, *supra* note 40, at 883.

⁵⁵ Balcke, *supra* note 30, at 128. The EPA can exercise the first remedial option under § 9607(a) and can require PRPs to initiate the cleanup under § 9606(a). *Id.*; see Stempien, *supra* note 6, at 1-2. CERCLA encourages private cleanup because it is usually cheaper than an EPA cleanup. Stempien, *supra* note 6, at 2-3. The EPA spends more money because it knows it can recover costs from PRPs. *Id.*; Traylor, *supra* note 6, at 538 (explaining that CERCLA presents an overriding policy to recover funds spent out of the Superfund and to encourage voluntary cleanup by PRPs).

⁵⁶ See Connelly, *supra* note 43, at 18 (discussing the elements of a cost recovery action under CERCLA). The controversy stemming from these cost recovery actions against PRPs involves the issue of passive migration. *Id.* Passive migration includes the spreading of contamination from one part of a contaminated area to another. *Id.*; Stempien, *supra* note 6, at 4. Passive migration is a problem because it leads to groundwater contamination, contamination of surrounding property, and an increase in cleanup costs as well as a greater likelihood that natural resources will be damaged. Stempien, *supra* note 6, at 4; see also Bronston, *supra* note 4, at 611 (arguing that this is an important controversy because the EPA is constantly finding more sites where passive migration is taking place); Irwin, *supra* note 4, at 147 (estimating that in 1993, there were approximately 130,000 to 380,000 sites that were potential candidates for government cleanup and that 75-100 sites will be added each year).

⁵⁷ 42 U.S.C. § 9607(a)(2) (emphasis added); see Ruhl, *supra* note 9, at 1130. Ruhl views this controversy as dealing with a passive past owner ("PPO") who at one time owned, but no longer owns, a contaminated property and neither knew of or contributed to the contamination during ownership. Ruhl, *supra* note 9, at 1130. These PPOs find themselves surprised when they are found liable years or even decades after they have terminated ownership of the property. *Id.*

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problem centers on the meaning of the word "disposal."⁵⁸ CERCLA defines the term as follows:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.⁵⁹

Some courts construe the word "disposal" as having an active meaning, whereby a party can only be held liable if the party was responsible for the initial introduction of the hazardous waste into the property.⁶⁰ Other courts treat "disposal" as having a passive interpretation, whereby a party can be held liable if the party owns the facility at the time when hazardous waste leaks from underground storage tanks or seeps into the soil or groundwater.⁶¹

A typical scenario involving this controversy arises when a landowner improperly disposes of hazardous waste, causing the property to become contaminated.⁶² A second owner then purchases the land from the first owner, uses the property for a different purpose, but does not add any additional contamination and is unaware that the original contamination exists. While the second owner possesses the property, contamination introduced by the first owner spreads through

⁵⁸ See *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 227 F.3d 1196 (9th Cir. 2000); *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992); *United States v. Waste Indus., Inc.*, 734 F.2d 159 (4th Cir. 1984); *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346 (N.D. Ill. 1992); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454 (N.D. Cal. 1989).

⁵⁹ 42 U.S.C. § 6903(3) (2000). This definition was adopted from the Resource Conservation and Recovery Act (RCRA). *Id.*

⁶⁰ See *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351 (2d Cir. 1997); *CDMG Realty Co.*, 96 F.3d 706; *Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750 (5th Cir. 1994); *Redwing Carriers, Inc. v. Saraland Apts., Ltd.*, 875 F. Supp. 1545 (S.D. Ala. 1995); *Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346; *Ecodyne Corp.*, 718 F. Supp. 1454.

⁶¹ See *Carson Harbor Vill., Ltd.*, 227 F.3d 1196; *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992); *Nurad, Inc.*, 966 F.2d 837; *Waste Indus., Inc.*, 734 F.2d 159 (interpreting RCRA's definition of "disposal"); *New York v. Almy Bros., Inc.*, 866 F. Supp. 668 (N.D.N.Y. 1994); *Stanley Works v. Snydergeneral Corp.*, 781 F. Supp. 659 (E.D. Cal. 1990); *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981) (interpreting RCRA's definition of "disposal"); *In re Hemingway Transp., Inc. v. Kahn*, 108 B.R. 378 (Bankr. D. Mass. 1989).

⁶² *Bronston*, *supra* note 4, at 610; see also *Caplan*, *supra* note 18, at 10122.

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the property via migration or leaching.⁶³ The second owner then sells the property to a third owner who possesses the property when the cleanup action begins. The first owner, who introduced the hazardous waste into the property, is generally liable, and the owner at the time of cleanup is always liable for the cost of cleanup.⁶⁴ The difficulty arises in determining whether the second landowner should be held liable as an "owner at the time of disposal" for owning the land during the time the contamination spread over the property.⁶⁵

In this situation, the interpretation of the word "disposal" becomes important. If the court determines that "disposal" includes passive migration, then the second owner is liable for the waste migration that took place during his ownership, making him liable for the costs of the cleanup.⁶⁶ This question currently remains unanswered because of a circuit split over the meaning of the word "disposal."⁶⁷

III. THE CIRCUIT SPLIT: ACTIVE V. PASSIVE MIGRATION

Currently, courts employ two different approaches when interpreting the word "disposal:" some argue for an active interpretation while others advocate a passive interpretation.⁶⁸ The existence of reasonable arguments and precedent to support both positions only increases the confusion. Not surprisingly, no majority approach exists. As a result, parties to a lawsuit typically have no idea how the court will analyze their case until after the court has actually done so. The following Part sets forth the two current approaches and the cases supporting each position.

⁶³ Bronston, *supra* note 4, at 610; see Caplan, *supra* note 18, at 10122 (defining leaching as the process or an instance of separating the soluble components from some material by percolation).

⁶⁴ See 42 U.S.C. § 9607(a) (2000). The initial owner who contaminated the property is liable under § 9607(a)(3) as a person who arranged for the "disposal" of the waste at the facility, and the third owner is liable under § 9607(a)(1) as the present owner and operator of the facility. *Id.*

⁶⁵ See generally *id.* § 9607(a)(2).

⁶⁶ Bronston, *supra* note 4, at 610.

⁶⁷ See *infra* Part III for a discussion of the circuit split over the word "disposal."

⁶⁸ See *infra* Part III.A-B for the two approaches of interpretation.

A. *Arguments for the Passive Theory of Migration*

Courts frequently use several arguments to support the inclusion of passive migration in the definition of "disposal."⁶⁹ One argument suggests that, because CERCLA's definition of "disposal" was adopted from the Resource Conservation and Recovery Act ("RCRA"), the same interpretation of the word should be used for both RCRA and CERCLA.⁷⁰ Some of the first cases to interpret the word occurred prior to the passage of CERCLA.⁷¹ Congress passed RCRA in 1976 as "a comprehensive solution to the regulation of hazardous waste disposal."⁷² Before the passage of RCRA, Congress issued findings that technological improvements in manufacturing and the economic and population growth of the nation, when combined with the continued concentration of the population in metropolitan areas, had led to an increase in the amount of discarded scrap and waste material.⁷³ Congress felt that while the collection and disposal of hazardous wastes should remain primarily a function of the state, federal financial and technical assistance was necessary to develop new and improved processes to reduce the amount of waste and to provide proper and economical solid waste disposal practices.⁷⁴ Besides finding that waste production was on the rise, Congress discovered that the increased output was affecting the environment and the health of the population.⁷⁵ These discoveries made

⁶⁹ See *supra* note 61 (listing cases arguing for the passive interpretation of "disposal").

⁷⁰ See 42 U.S.C. § 9601(29) (2000) (referring to 42 U.S.C. § 6903 for the definition of "disposal").

⁷¹ See *United States v. Waste Indus., Inc.*, 734 F.2d 159 (4th Cir. 1984); *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981).

⁷² Bronston, *supra* note 4, at 622; see APPLEGATE, *supra* note 16, at 662 (describing how RCRA was technically passed as an amendment to the Solid Waste Disposal Act of 1965).

⁷³ 42 U.S.C. § 6901(a)(1)-(4) (2000).

⁷⁴ *Id.* § 6901(a)(4).

⁷⁵ *Id.* § 6901(b)(1)-(8). These findings included the discoveries that

- (1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;
- (2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;
- (3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

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Congress aware of the need to pass legislation to deal with these problems, and the result was RCRA.⁷⁶

The purpose of RCRA was to “assure that hazardous waste-management practices would be conducted in a manner that protects human health, the environment, and the conservation of resources.”⁷⁷ RCRA encourages recycling research and the establishment of state solid waste control plans; the statute also includes a “cradle-to-grave” tracking system known as “Subtitle C,” which requires regulation of hazardous wastes from generation to disposal.⁷⁸ If waste falls within the structure and definition of Subtitle C, then it is fully regulated no matter what the

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

Id.

⁷⁶ *Id.* § 6901; see Dennis B. Danella, Note, *Avondle Fed. Savings Bank v. Amoco Oil Co.: No Equity in Sight for RCRA Victims*, 48 KAN. L. REV. 663, 666 (2000). Hazardous waste was traditionally controlled by state and local regulations, but these regulations proved inadequate to deal with the immensity of the problem. Danella, *supra*.

⁷⁷ Danella, *supra* note 76, at 666. RCRA’s policy states that hazardous “[w]aste that is . . . generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.” *Id.*

⁷⁸ DAVID B. WEINBERG ET AL., HAZARDOUS WASTE REGULATION HANDBOOK, A PRACTICAL GUIDE TO RCRA AND SUPERFUND 1 (1983). The “cradle-to-grave” title means that RCRA regulates hazardous waste from the point of generation to the point of disposal. APPLIGATE, *supra* note 16, at 680. This “cradle-to-grave” tracking system developed under RCRA requires the EPA to identify and list hazardous wastes, to set standards for generators, transporters, and treatment, storage, and disposal facilities (“TSDFs”), to establish a permitting program for TSDFs, to authorize the states to implement equivalent programs, and to provide enforcement. *Id.* at 678; see also Danella, *supra* note 76, at 667. See generally 42 U.S.C. §§ 6921-6924 (2000).

actual risk of the material.⁷⁹ RCRA encourages states to set up their own hazardous waste programs, and, through the statute's indirect influence over the costs and liabilities of waste management, RCRA increases the attractiveness of recycling and recovery.⁸⁰

Until the early 1980s, the responsibilities established by RCRA under Subtitle C were neglected because of either another environmental policy taking priority or the indifference of the administration in power to environmental regulation.⁸¹ Between 1980 and 1982, because of a court order and pressure from Congress and the public, the EPA finally began to implement the necessary provisions to make RCRA an enforceable statute.⁸² RCRA, like the Clean Air Act and the Clean Water Act, is designed to maintain the traditional local control that was historically associated with waste disposal.⁸³ Under RCRA, the EPA, using its technical expertise, set up detailed guidelines to allow the states to develop standards and programs.⁸⁴

⁷⁹ RICHARD C. FORTUNA & DAVID J. LENNETT, HAZARDOUS WASTE REGULATION, THE NEW ERA 26 (1987). Hazardous waste is defined as

a solid waste, or combination of solid wastes that, because of its quantity, concentration, or physical, chemical, or infectious characteristics, may:

1. cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or
2. pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id.; see APPLEGATE, *supra* note 16, at 680. Under RCRA, a waste is considered to be a hazardous waste if it is a listed waste or if it exhibits any of the characteristics defined by the EPA. APPLEGATE, *supra* note 16, at 707. These characteristics are ignitability, corrosivity, reactivity, and toxicity. *Id.*

⁸⁰ APPLEGATE, *supra* note 16, at 678. The costs and liabilities are influenced by RCRA because of the more stringent regulations that are being enforced on the production of hazardous wastes. *Id.* In addition, the tight controls that RCRA exercises over waste disposal facilities increases both the cost and the difficulty of disposing of wastes, and, therefore, it provides an incentive to avoid the production of these wastes. *Id.*

⁸¹ FORTUNA & LENNETT, *supra* note 79, at 10-13; see APPLEGATE, *supra* note 16, at 678. During the Carter administration, the main focus of environmental policy was on completing the rules for the Clean Water Act and the Clean Air Act. APPLEGATE, *supra* note 16, at 678. During the Reagan administration, there was generally no concern for environmental regulation, so RCRA again was put aside. *Id.*

⁸² APPLEGATE, *supra* note 16, at 678.

⁸³ *Id.* at 679.

⁸⁴ *Id.* States are given the funding to implement federal programs, though the EPA must grant final authorization for the state program to be considered an equivalent of the EPA's

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The main civil enforcement section that the EPA uses under RCRA is called the "imminent hazard provision."⁸⁵ Under this provision, the EPA can obtain injunctive relief for hazardous waste contamination that poses an imminent hazard to human health or the environment.⁸⁶ RCRA's imminent hazard provision uses the term "disposal" in much the same way that CERCLA uses the word.⁸⁷ Because Congress chose to use the same definition of "disposal" in RCRA and CERCLA, some courts have studied RCRA decisions to assist in the interpretation of "disposal" under CERCLA.⁸⁸

In *United States v. Price*,⁸⁹ Charles Price and his wife owned a landfill in New Jersey.⁹⁰ In 1979, A.G.A. Partnership bought the landfill from Price, and Price informed A.G.A. that the property had been a landfill.⁹¹

program. *Id.* RCRA does allow states to write standards that are more stringent than the federal regulations. *Id.*

⁸⁵ 42 U.S.C. § 6973(a) (2000). The imminent hazard provision states that,

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit . . . against any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation or disposal, to order such person to take such other action as may be necessary, or both.

Id.; see also Bronston, *supra* note 4, at 621.

⁸⁶ APPELGATE, *supra* note 16, at 802. The EPA can enforce this provision if it can prove the following: (1) conditions at a site present an imminent or substantial endangerment, (2) the endangerment is caused or was caused by the handling of hazardous waste, and (3) the defendant has contributed or is contributing to the hazardous waste that poses the threat. *Id.*

⁸⁷ 42 U.S.C. § 6973(a).

⁸⁸ See *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992).

⁸⁹ 523 F. Supp. 1055 (D.N.J. 1981).

⁹⁰ *Id.* at 1058. Although the land was originally used by Price to excavate sand and gravel for his road construction business, he later began operating it as a landfill and continued to do so for approximately one year before obtaining a license. *Id.* at 1059. Price's original permit for the landfill did not include the acceptance of chemical wastes, but he disposed of these wastes regardless. *Id.* at 1060. In addition, once Price did obtain the proper permit to dispose of solid wastes, he accepted liquid and chemical wastes, in direct violation of his new permit. *Id.* Furthermore, the wastes were disposed of in an unsafe manner by simply burying barrels under the landfill or pouring the waste into the landfill. *Id.* In 1976, Price terminated operation of the landfill and covered the site with fill material. *Id.* at 1061.

⁹¹ *Id.* at 1058. A.G.A. made no inquiry to Price as to the presence of chemicals or toxic wastes and never visited the property before the time of purchase. *Id.* In mid-1979, A.G.A.

At no time did A.G.A. actively dispose of waste on the property or contribute to the migration of chemicals.⁹² However, the company did nothing to prevent the spread of chemicals on the property.⁹³ The court first noted that RCRA's definition of "disposal" under § 6903 "is quite broad."⁹⁴ What the court found more significant was the fact that the definition includes the term "leaking," "which ordinarily occurs not through affirmative action, but as a result of inaction or negligent past actions."⁹⁵ The court held that RCRA's plain language authorizes relief to restrain further disposal or spreading of waste that presents an imminent hazard—the leaking of hazardous waste into groundwater, for instance.⁹⁶ Further, the court concluded that the disposal, to be prevented from spreading, "need not result from affirmative action by the defendants but may be the result of passive inaction."⁹⁷ The court looked at the actions and inactions of the defendants in *Price* and determined that the defendants' behavior was the cause of the current hazardous situation.⁹⁸ The court also considered the legislative history of RCRA and concluded that Congress intended the phrase "contributing to" disposal to be interpreted liberally, that Congress

became aware, through newspaper accounts, that toxic chemicals were buried beneath the Price property. *Id.* These toxic chemicals included compounds that, even in low concentrations, can result in adverse health affects. *Id.* at 1062. Some of them were carcinogenic, degrade poorly, and tend to persist in the environment. *Id.*

⁹² *Id.* at 1059.

⁹³ *Id.* After testing water samples from the area surrounding the Price landfill, the EPA found significant contamination of the water drawn from wells on the landfill and from the surrounding area. *Id.* at 1062. The defendants, including Price individually and as Price Trucking Company, argued that they should have been granted summary judgment against the government's recovery action because, at the time the action was brought, they were not dumping chemicals in the landfill. *Id.* at 1069.

⁹⁴ *Id.* at 1071; see 42 U.S.C. § 6903(3) (2000). The term "disposal" under RCRA is defined as

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water.

42 U.S.C. § 6903(3).

⁹⁵ *Price*, 523 F. Supp. at 1071.

⁹⁶ *Id.* Though the court held that the imminent hazard provision could be used to restrain further discharge, they concluded that RCRA does not allow for the general cleanup of dormant waste disposal sites. *Id.*

⁹⁷ *Id.* at 1071; see Traylor, *supra* note 6, at 548. In this situation, the natural hydrological characteristics of the waste and the surrounding soil were the prime causes of the migration. Traylor, *supra* note 6, at 548.

⁹⁸ *Price*, 523 F. Supp. at 1072.

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realized that past acts could cause present dangers, and that those acts were intended to fall within the statute even if not explicitly stated.⁹⁹ In holding the defendants responsible under RCRA in the absence of affirmative conduct, the court interpreted the word "disposal" to include passive migration.¹⁰⁰

Like the court in *Price*, the court in *United States v. Waste Industries, Inc.*¹⁰¹ held that the definition of "disposal" included passive migration.¹⁰² The case involved a landfill operated by Waste Industries that was investigated for water pollution.¹⁰³ Waste Industries signed a contract to establish and operate landfills for solid waste disposal.¹⁰⁴ The landfill in question used a "sand barrow pit" at the disposal facility.¹⁰⁵ The waste placed into the sandpit began to leach through the sand and entered the groundwater aquifer below.¹⁰⁶ Residents near the landfill began to notice that their water was discolored and that it had a foul taste and smell.¹⁰⁷ On account of the contaminated water, many residents were unable to use the surplus water tanks that the county installed, while others were forced to drive elsewhere to do their wash or

⁹⁹ *Id.* at 1073. Because the court found that Congress realized that past acts could cause present harms, they also concluded that they, therefore, wanted RCRA to include retroactive liability so that these past acts would make parties responsible for present conditions. *Id.* The court viewed Price's improper methods of storing chemicals in the past as presently contributing to the leaking of the chemical contaminants into the groundwater and, thus, making them proper defendants in the case. *Id.* Because the defendants were being punished for the current continuing "disposal," the statute was not punishing them for injuries caused by past acts but for injury caused by the present spreading of the waste. *Id.* Further, A.G.A. was a proper defendant because it contributed to the "disposal" of the waste by its indifference to the hazardous condition, and as a sophisticated investor, it had a duty to investigate the conditions of the property. *Id.*

¹⁰⁰ *Id.*; see Irwin, *supra* note 4, at 152. "Disposal" includes "inaction or negligent inaction on the part of the past owner." Irwin, *supra* note 4, at 152. *Id.*

¹⁰¹ 734 F.2d 159 (4th Cir. 1984).

¹⁰² *Id.* at 165.

¹⁰³ *Id.* at 161.

¹⁰⁴ *Id.* This contract was a result of the county having no waste disposal facilities, and the public was disposing of waste on private property without the permission of the owners. *Id.*

¹⁰⁵ *Id.* at 162. A "sand barrow pit" is a hole from which sand is removed that is used for waste disposal, and, in this case, it was composed of highly permeable sand. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Before the operation of this landfill began, the residents had always had high quality groundwater. *Id.* After the landfill began to operate, some of the residents began to suffer from illnesses and side effects of the contaminated water such as blisters, boils, and stomach distress. *Id.*

to abandon their homes entirely.¹⁰⁸ An EPA groundwater analysis revealed a large number of toxic chemicals in the water, including known carcinogens.¹⁰⁹ Moreover, EPA tests indicated that the leaching and migration of the contaminants would continue indefinitely unless remedial action was taken.¹¹⁰ The district court held that there was no action under RCRA because the statute did not include, as an actionable claim, the abatement of leaching contamination.¹¹¹ The Fourth Circuit disagreed and refused to limit the interpretation of "disposal" to include only active conduct.¹¹²

Like the court in *Price*, the Fourth Circuit examined the term "leaking" in the definition of "disposal" and concluded that the word choice implied that Congress intended "disposal" to include "conduct, a physical state, and an occurrence"—in other words, passive migration.¹¹³ The court continued to read the term "disposal" broadly, and, owing to the word's frequent recurrence throughout the statutory language, concluded that it must encompass both routine regulatory concerns as well as emergency situations.¹¹⁴ Congress used this broad language to close statutory loopholes that might allow harm to be done to the environment.¹¹⁵ Again, the court stressed that the Act could be used to

¹⁰⁸ *Id.* These surplus tanks were installed after residents demanded them; although, because of infirmity or disability, there were still many who could not get to the new tanks to use them. *Id.*

¹⁰⁹ *Id.* The chemical contamination was the result of improper disposal practices at the Waste Industries landfill, and they migrated from the landfill into the residential wells. *Id.* The levels of chemicals present in the wells were sufficient to adversely affect human health and the environment and made the well water unfit for human consumption. *Id.*

¹¹⁰ *Id.* at 163. A new water system that had been installed could not remedy the problem. *Id.* The contamination continued to spread as precipitation transported the contamination from the landfill and through permeable soil where it reached the local aquifer and moved through the groundwater. *Id.*

¹¹¹ *Id.* This claim was ruled as not actionable because the court held that the provision of RCRA was not intended to apply to past conduct that ended before the enforcement was sought. *Id.*

¹¹² *Id.* The court reached this conclusion partly by looking at where the section is located in the statute and determined that, due to this location, it was meant to deal with situations where regulatory schemes have broken down or been circumvented. *Id.* at 164. The court also looked to the language of the section that "authorizes the administrator to bring an action against any person contributing to the alleged disposal to stop such disposal 'or to take such other action as may be necessary.'" *Id.*; see also 42 U.S.C. § 6903(3) (2000).

¹¹³ *Waste Indus., Inc.*, 734 F.2d at 164. The court said that leaking occurs when landfills are poorly constructed and drums or tank trucks corrode, rust, or rot, releasing chemicals. *Id.*

¹¹⁴ *Id.* at 165.

¹¹⁵ *Id.* The court reasoned that limiting the enforcement of RCRA to situations involving active conduct would "open a gaping hole in the overall protection of the environment

enforce liability for past events causing a contemporary problem.¹¹⁶ Therefore, the *Waste Industries* court also found the definition of "disposal" to include passive migration.¹¹⁷

Because courts have interpreted "disposal" to include passive migration under RCRA, and CERCLA uses the same definition, some courts have argued that "disposal" under CERCLA should also include passive migration.¹¹⁸ Two cases, *Nurad, Inc. v. William E. Hooper & Sons Co.*¹¹⁹ and *Carson Harbor Village v. Unocal Corp.*¹²⁰ are the two most widely cited cases advocating a passive interpretation of "disposal."¹²¹ These cases base their conclusion, that "disposal" should include passive migration, on the following factors: (1) the language of CERCLA; (2) the frustration of CERCLA's purpose; (3) the innocent owner defense; and (4) the inconsistencies related to the active interpretation.¹²²

In *Nurad*, the plaintiff brought a recovery action against William Hooper for costs incurred in removing several underground storage tanks.¹²³ From 1905 to 1963, William Hooper & Sons Company ("Hooper") owned the site in question.¹²⁴ In 1935, Hooper began to install underground tanks for use in its textile finishing plant and

envisioned by Congress" by not attaching liability to all the parties that should be held responsible. *Id.* The court was concerned that this narrow interpretation would leave the Nation without a means to respond to disasters that resulted from previous poor planning and that the resources would never be restored to their previous state. *Id.*; see Traylor, *supra* note 6, at 550 (explaining that *Waste Industries* circumvented the requirements of RCRA, and to allow them to hide behind the statute would not address the pollution and would create a loophole in RCRA enforcement).

¹¹⁶ *Waste Indus., Inc.*, 734 F.2d at 166. The court explained this conclusion by stating that the "[i]mmine[n]ce [of this section] applies to the nature of the threat rather than identification of the time when the endangerment initially arose." *Id.*

¹¹⁷ *Id.*

¹¹⁸ See 42 U.S.C. § 9601(29) (2000). Disposal "shall have the [same] meaning provided in section 1004 of" RCRA. *Id.*; see also *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 227 F.3d 1196 (9th Cir. 2000); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992) (claiming that because the question was already decided in *Waste Industries*, the court is bound to interpret "disposal" as including passive migration); *Stanley Works v. Snydergeneral Corp.*, 781 F. Supp. 659, 664 (E.D. Cal. 1990) (arguing that there is no distinction between CERCLA and RCRA in terms of the definition of "disposal" because the definition is "identical under both statutory schemes").

¹¹⁹ 966 F.2d 837.

¹²⁰ 227 F.3d 1196.

¹²¹ *Id.*; *Nurad, Inc.*, 966 F.2d 837.

¹²² *Carson Harbor Vill., Ltd.*, 227 F.3d at 1205-10; *Nurad, Inc.*, 966 F.2d at 841-46.

¹²³ *Nurad, Inc.*, 966 F.2d at 840.

¹²⁴ *Id.*

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continued to use the tanks for storage until 1962, when the company shut down its operations.¹²⁵ Hooper abandoned the underground tanks and did not remove the chemicals inside them.¹²⁶ In 1963, the property was sold to Property Investors, Inc., and a portion was subdivided and sold to Nurad in 1976.¹²⁷ In 1987, the Maryland Department of the Environment informed Nurad that the underground tanks needed to be removed or filled with sand or concrete within 180 days.¹²⁸ Thereafter, Nurad filed a CERCLA suit for reimbursement against the former owners for cleanup costs.¹²⁹ In its analysis, the *Nurad* court focused on two major issues: (1) the language of CERCLA and (2) the policy behind CERCLA.¹³⁰

1. Language of CERCLA

In evaluating the term "disposal," the *Nurad* court, like the *Waste Industries* court, examined the words "discharge," "leak," and "spill" in the definition of "disposal" and concluded that the terms have a passive component.¹³¹ According to the rules of statutory construction, when a word is defined, the court is bound by that meaning.¹³² Because the

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* Nurad's operation involved the manufacture of antennae, and, during its ownership, Nurad did not use the storage tanks that were left by Hooper. *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 841. Nurad filed suit against several former tenants of the property, but the district court found that only Hooper should be held liable for the cleanup costs. *Id.* The district court held that certain other defendants were not liable because they were not owners at the time of "disposal." *Id.* "Disposal" was defined by the court as requiring some element of affirmative participation. *Id.*

¹³⁰ *Id.* at 841, 844.

¹³¹ *Id.* at 845. The court felt bound to follow the *Waste Industries* decision because Congress provided that "disposal" should have the same meaning under RCRA and CERCLA. *Id.* In addition, the court held that the "aim of both RCRA and CERCLA is to encourage the cleanup of hazardous waste conditions." *Id.*; see *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164 (4th Cir. 1984); see also *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 227 F.3d 1196, 1206 (9th Cir. 2000) (explaining that a hazardous waste could easily "discharge," "spill," or "leak" without the assistance of human participation). "Discharge" is defined as "a flowing out." WEBSTER'S NEW AMERICAN DICTIONARY 148 (Merriam-Webster eds., 1995). "Leak" is defined as "a crack or hole that accidentally admits a fluid or light or lets it escape." *Id.* at 295. "Spill" is defined as "to run out or over with resulting loss or waste." *Id.* at 498.

¹³² *Carson Harbor Vill., Ltd.*, 227 F.3d at 1206; see *Pantry, Inc. v. Stop-n-Go Foods, Inc.*, 796 F. Supp. 1171, 1177 (S.D. Ind. 1992).

"Leaking" does not commonly imply an intentional act. Rusted barrels, radiators, [underground storage tanks] each may "leak" without anyone's aid or knowledge; moreover, an unseen or

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statute includes these words and their definitions connote a passive interpretation, the court was bound to read these words as having a passive meaning and to construe the statute to include liability for passive migration.¹³³

2. Frustration of CERCLA's Purpose

The *Nurad* court asserted that using a strictly active interpretation of the statute would frustrate the statute's policy of encouraging private parties to voluntarily remedy environmental hazards and that "an owner could avoid liability simply by standing idle while an environmental hazard festers on his property."¹³⁴ Concerns about a lack of incentive for parties to clean up hazardous waste sites led the court to conclude that a broad interpretation of the statute was necessary.¹³⁵ The court did not believe that Congress intended a CERCLA liability scheme that would reward indifference or discourage voluntary cleanup efforts and, therefore, held that liability extended to the owner of the facility "at a time that hazardous waste was spilling or leaking."¹³⁶

unintended gravity-aided release from these containers would most naturally be called a "leak." Were one purposefully to refer solely to a controlled or intentional release of some substance, one would almost never use the term "leak" to capture that meaning Therefore, the word "leaking," by itself, plainly includes and likely connotes an unintentional or inadvertent release.

Pantry, Inc., 796 F. Supp. at 1177; see also 2A SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 47.07, at 227 (6th ed. 2000).

¹³³ *Nurad, Inc.*, 966 F.2d at 845. The district court arbitrarily chose not to follow the definitions of these words, even though the court in *Waste Industries* had already given the definition of "disposal" a broad reading. *Id.*; see Bronston, *supra* note 4, at 614 (arguing that the court can infer the passive meaning of "disposal" by inferring from the other words in the definitional list that Congress intended "disposal" to "encompass a wide variety of phenomena"); see also Lipinski, *supra* note 8, at 108.

¹³⁴ *Nurad, Inc.*, 966 F.2d at 845. The court argued that an owner could insulate himself from liability as long as the property is transferred before remedial costs are incurred. *Id.* But an owner who undertakes the cleanup would be held liable as a current owner, without the need to establish the "disposal" requirement. *Id.* In this way, the owner who failed to clean up, and then transferred the property, is rewarded by not being held liable, while the owner who cleaned the contamination would be liable. *Id.* This interpretation of the statute creates a strong disincentive for private parties to initiate cleanup, and this cannot be what Congress had intended. *Id.*; see also New York v. Almy Bros., Inc., 866 F. Supp. 668, 676 (N.D.N.Y. 1994); Stempien, *supra* note 6, at 20; May, *supra* note 4, at 391.

¹³⁵ See May, *supra* note 4, at 391.

¹³⁶ *Nurad, Inc.*, 966 F.2d at 846. This holding allowed Nurad to recover costs from some of the prior owners of the property. *Id.* at 847; see Caplan, *supra* note 18, at 10122

One of the most recent decisions including passive migration under CERCLA's definition of "disposal" applied similar reasoning to reach the same conclusion as the *Nurad* court.¹³⁷ In *Carson Harbor Village v. Unocal Corp.*,¹³⁸ Carson Harbor Village ("Carson Harbor") owned a mobile home park from 1977 to 1983.¹³⁹ Between 1945 and 1983, Unocal used the property for petroleum production.¹⁴⁰ In 1993, a private environmental study of the property revealed slag and tar material in the wetland portion, and further investigation revealed that the material had been on the property several decades before the mobile home park was developed.¹⁴¹ Owing to the high levels of lead found in the soil, environmental agencies decided to clean up the tar and slag.¹⁴² After the material was removed and no further cleanup action was deemed necessary, Carson Harbor filed suit seeking to recover costs for the remedial action.¹⁴³

The Ninth Circuit reversed the district court's holding that Carson Harbor could not recover because the spread of the contamination into the surrounding soil did not constitute a "disposal."¹⁴⁴ Besides agreeing with the arguments set forth in *Nurad*, the *Carson Harbor* court focused on two additional issues: the innocent landowner defense and certain

(emphasizing that it is ownership and not culpability that triggers liability); Lipinski, *supra* note 8, at 109.

¹³⁷ *Carson Harbor Vill., Ltd.*, 227 F.3d at 1196.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1199.

¹⁴⁰ *Id.* Unocal operated oil wells, pipelines, above-ground tanks, and production facilities. *Id.*

¹⁴¹ *Id.* The study also revealed that the material was from some form of waste or by-product of petroleum production, the material was four feet thick, covering an area 30 by 160 feet, and the material and surrounding soil contained an elevated level of petroleum hydrocarbons and lead. *Id.* at 1200; see also Billie J. England v. A.K. Steel Co., No. CA96-05-099, 1996 Ohio App. LEXIS 3687, at *1 (Ohio Ct. App. Sept. 3, 1996) (describing slag as discharge from blast furnaces that occurs during the production process of casting iron).

¹⁴² *Carson Harbor Vill., Ltd.*, 227 F.3d at 1200. A remedial action plan was submitted to the controlling environmental agency, which proposed to remove the tar and slag material, and the cleanup commenced during the summer of 1995. *Id.* Over a five-day period, 1042 tons of material were removed. *Id.*

¹⁴³ *Id.* at 1201. The district court granted certain parties summary judgment because the court held that Carson Harbor could not show that the remedial action was necessary and that CERCLA was not designed to permit property owners to unnecessarily clean up their properties and then pass the costs on to others. *Id.* Further, the court held that Carson Harbor failed to show that these defendants were owners of the property at the time of "disposal," as required by CERCLA. *Id.*

¹⁴⁴ *Id.* at 1206; see Connelly, *supra* note 43, at 19 (explaining that the district court found "[m]ere passive migration" insufficient to constitute "disposal").

inconsistencies created when the active interpretation of "disposal" is used.¹⁴⁵ The court analyzed the statutory definition of "disposal" and determined that a spill or leak could occur without human participation and concluded that, because the definition includes passive activities, it was bound to give the word "disposal" that effect.¹⁴⁶ The court also interpreted the purpose and structure of CERCLA as supporting the inclusion of passive migration.¹⁴⁷ CERCLA's goal is primarily remedial, and the statute's provisions should, therefore, be interpreted liberally, in favor of liability.¹⁴⁸ That a passive meaning should be given to the term "disposal," is supported, not only by a broad reading of CERCLA, but also by CERCLA's emphasis on strict liability.¹⁴⁹ The *Carson Harbor* court found that the statute imposes strict liability on owners at the time of "disposal."¹⁵⁰ The court also noted that Congress designed CERCLA to "create a mechanism for prompt cleanup" and that Congress had knowledge that many parties responsible for pollution were insolvent or no longer in existence and, accordingly, would be unable to contribute to the cost of cleanup.¹⁵¹ Therefore, causation requirements would not be as effective because the cleanup would simply not occur if the parties who were responsible under causation could not pay; on the other hand,

¹⁴⁵ *Carson Harbor Vill., Ltd.*, 227 F.3d at 1208.

¹⁴⁶ *Id.* at 1206-07. The Ninth Circuit rejected a "strained reading" of "disposal" and found the arguments for passive migration to be straightforward. *Id.* at 1207; see Connelly, *supra* note 43, at 20.

¹⁴⁷ *Carson Harbor Vill., Ltd.*, 227 F.3d at 1207. This purpose and structure included providing "for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." *Id.*

¹⁴⁸ *New York v. Almy Bros., Inc.*, 866 F. Supp. 668, 674 (N.D.N.Y. 1994); see *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992); see also *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (concluding that statutes such as CERCLA, which were enacted for the protection and preservation of public health, should be given an extremely liberal construction for the accomplishment of their beneficial objectives).

¹⁴⁹ *Carson Harbor Vill., Ltd.*, 227 F.3d at 1207. CERCLA was enacted to impose the costs of cleanup on responsible parties, but because Congress was aware that many of these parties would be insolvent, they abandoned causation requirements and created a strict liability scheme. *Id.* The view that CERCLA liability can only be triggered by active disposal is at odds with this strict liability emphasis. *Id.* Liability is triggered under CERCLA by being an owner or operator of a facility at the time of "disposal." *Id.* The statute does not mention the need for any culpability or responsibility for the contamination. *Id.* By requiring the liable party to have actively disposed of the waste, the court would be reading elements of causation into CERCLA, which was exactly what Congress did not intend. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

if a showing of causation was not required, more parties could be joined to pay.¹⁵² By this reasoning, the court decided that an active interpretation would create a causation analysis not intended by Congress.¹⁵³

3. Analysis of the Innocent Landowner Defense Under Passive Migration

While the *Nurad* court was not confronted by the innocent landowner defense, the *Carson Harbor* court held that the passive interpretation does not discredit the theory, which applies if the property was acquired "after the disposal or placement of the hazardous substances."¹⁵⁴ Some had argued that by construing "disposal" to include passive migration, the innocent landowner defense would never apply.¹⁵⁵ But the innocent landowner defense actually applies if the property "was acquired . . . after the disposal or placement of the hazardous substance[s] . . ."¹⁵⁶ The *Carson Harbor* court concluded that the defense is still applicable because, by using the word "placement" instead of "disposal," Congress intended the defense to apply even though wastes were passively migrating, so long as the defendant acquired the property after the wastes were placed on the property.¹⁵⁷ This is true even if hazardous wastes were passively migrating during the defendant's ownership, so long as the defendant acquired the property after the hazardous wastes were deposited.¹⁵⁸

4. Inconsistencies Created by the Active Theory of Disposal

Finally, the *Carson Harbor* court held that an active theory of "disposal" would create certain inconsistencies, such as Congress

¹⁵² *Id.*; see also *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992). "The trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination." *Nurad, Inc.*, 966 F.2d at 846.

¹⁵³ *Carson Harbor Vill., Ltd.*, 227 F.3d at 1207.

¹⁵⁴ *Id.* at 1209-10 (emphasis omitted); see 42 U.S.C. § 9601(35)(A) (2000); *United States v. CDMG Realty Co.*, 96 F.3d 706, 716 (3d Cir. 1996); see also *supra* note 50 for the statutory language of the innocent landowner defense.

¹⁵⁵ See *CDMG Realty Co.*, 96 F.3d at 716. The court concluded that under the passive theory, contamination would constantly be spreading, and, therefore, there would be no point in time after "disposal." *Id.* Showing that the facility was purchased after "disposal" is a necessary element to invoke the innocent landowner defense. *Id.*

¹⁵⁶ 42 U.S.C. § 9601(35)(A).

¹⁵⁷ *Carson Harbor Vill., Ltd.*, 227 F.3d at 1210.

¹⁵⁸ *Id.*

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distinguishing between current and former owner/operators.¹⁵⁹ Another inconsistency created by the active interpretation is the irrational distinction between prior owners.¹⁶⁰ After reviewing the statute and considering these factors, the court adopted the passive theory of "disposal" and held that Carson Harbor could proceed with its cost recovery claim against the defendants.¹⁶¹

5. Cases Supporting *Nurad* and *Carson Harbor*

Other cases have found the reasoning of the *Nurad* and *Carson Harbor* courts persuasive. The courts deciding these cases have adopted the reasoning of the *Nurad* and *Carson Harbor* courts entirely. The court in *In re Hemingway Transport, Inc.*¹⁶² used the reasoning of the *Nurad* court to determine that the definition of "disposal" should convey a passive interpretation.¹⁶³ In *Hemingway*, a chain of ownership for the property in question took place between 1974 and 1983.¹⁶⁴ During its ownership, Juniper, the current owner in the chain of title, received a "Notification of Potential Liability" from the EPA.¹⁶⁵ This notification was followed by an Administrative Order that made Juniper aware that barrels and soil on its property contained hazardous substances and that there was the

¹⁵⁹ *Id.* Under the active theory, it is assumed that Congress wanted to create a distinction between current and former owners. *Id.* This distinction would hold current owners liable without regard to fault, but it would create immunity for prior owners, unless they owned the property during an act of "disposal." *Id.* In addition, the court argued that under this theory, Congress must have intended a distinction between prior owners. *Id.* Owners during passive migration would be exempt even if they did not conduct a reasonable investigation into the environmental condition of the facility and even if they allowed known, pre-existing waste to remain untreated. *Id.* On the other hand, past owners at the time of an active "disposal" would be liable along with the current owner, even if they were in no way responsible for the "disposal." *Id.*

¹⁶⁰ *Id.* This is best exemplified by looking at an owner who held property while waste was passively migrating. *Id.* This owner would be exempt from suit even if he failed to review the property for environmental contamination or allowed a known, pre-existing condition to remain untreated. *Id.* But a prior "owner at the time of disposal" would be a responsible party, along with the current owner, even if the prior owner was not responsible and had no connection to the "disposal." *Id.*

¹⁶¹ *Id.*

¹⁶² 108 B.R. 378 (Bankr. D. Mass. 1989), *vacated by* 993 F.2d 915 (1st Cir. 1993).

¹⁶³ *Id.* at 382.

¹⁶⁴ *Id.* at 379. Hemingway leased the property from Woburn from 1974 to 1980. *Id.* Bristol, a subsidiary of Hemingway, owned the property from 1980 to 1983. *Id.* On May 18, 1983, Juniper purchased the property from Bristol and was the owner of the property at the time the case was heard. *Id.*

¹⁶⁵ *Id.* at 380. The notification indicated that a representative from the EPA had found fifty-five-gallon drums on the property. *Id.* These barrels were discovered after the EPA was notified of their presence by a local cable television station. *Id.*

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presence of an actual or threatened release of the substances owing to past, present, and potential migration.¹⁶⁶ After being informed of the barrels and the hazardous substance, Juniper took remedial action to clean up the property.¹⁶⁷ On the other hand, Hemingway took no action to remedy the contamination, and Juniper sued Hemingway for response costs.¹⁶⁸

The court in *Hemingway* used the language of the court in *Price* and agreed that "the definition of 'disposal' is quite broad" and, more significantly, like the court in *Nurad*, focused on the inclusion of the word "leaking" in the definition.¹⁶⁹ Using the analysis and arguments of other courts, the *Hemingway* court decided that disposal should include passive migration and that Hemingway should be required to pay Juniper for response costs.¹⁷⁰

In *New York v. Almy Brothers, Inc.*,¹⁷¹ another case following the precedent set by *Nurad* and *Carson Harbor*, the McMahon family owned a piece of property purchased from a company that had used the site for a milk processing and ice cream manufacturing plant.¹⁷² Part of the land was later sold to Almy, whose representatives noticed several barrels on the property.¹⁷³ Almy asked the McMahons to remove the barrels, and the McMahons complied by moving them to another part of the site not owned by Almy.¹⁷⁴ The McMahons then sold another part of the

¹⁶⁶ *Id.* The barrels that were discovered were described as rusted and overturned and as having semi-solid, tar-like substances leaking from them. *Id.* at 381. The substances that were leaking from the barrels were examined, and lubricating oil was found in the test sample. *Id.* Though the experts involved could not accurately determine when the contamination had occurred, they indicated that the chemicals that were found in the barrels, when mixed with rainwater, could contaminate the groundwater. *Id.*

¹⁶⁷ *Id.* at 380. Juniper spent \$8,555.61 on the cleanup of the property. *Id.* at 381.

¹⁶⁸ *Id.* Hemingway was informed and was required to help with removal of the barrels because it was considered an "owner at the time of disposal." *Id.*

¹⁶⁹ *Id.* at 382. The court also looked at RCRA and at the definition of the word "disposal" as functional and said that "waste is disposed under this provision if it is put into contact with land or water in such a way as to pose the risks to health and environment that animated Congress to pass RCRA." *Id.*

¹⁷⁰ *Id.* at 384.

¹⁷¹ 866 F. Supp. 668 (N.D.N.Y. 1994).

¹⁷² *Id.* at 672.

¹⁷³ *Id.* The barrels were found to contain pesticides and other hazardous substances. *Id.* at 674. The condition of the drums was disputed. *Id.* at 673 n.6. The State claimed that they were old and deteriorated and that many were rusting and cracking. *Id.* On the other hand, the McMahons, in several documents, described all of the drums on the property, and only one drum was described as rusted. *Id.*

¹⁷⁴ *Id.* at 672.

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property to Stilloe, who also noticed barrels on the property, but the McMahons refused Stilloe's request to remove them.¹⁷⁵ The court, in keeping with *Nurad* and other previous cases, held that the McMahons disposed of the barrels when they abandoned them and left them to deteriorate.¹⁷⁶ Moreover, the court adopted the reasoning of the *Nurad* court and concluded that if courts adopted the active interpretation of "disposal," then "[a]n owner could avoid liability simply by standing idle while an environmental hazard festers on his property."¹⁷⁷ The court held that liability was triggered, not merely by active involvement in disposing of hazardous waste, but also by ownership of property when leaking or spilling occurred.¹⁷⁸ Using the reasoning of the *Nurad* decision, the *Almy* court agreed that "disposal" should include passive migration.¹⁷⁹

B. Arguments for the Active Theory of Migration

Not all courts have agreed that Congress intended a passive theory of interpretation.¹⁸⁰ The courts in *United States v. CDMG Realty Co.*¹⁸¹ and *United States v. Petersen Sand & Gravel, Inc.*¹⁸² found five basic arguments persuasive in concluding that "disposal" requires an affirmative action to create liability.¹⁸³ These arguments include: (1) the language of CERCLA; (2) the innocent owner defense; (3) the goals of CERCLA; (4)

¹⁷⁵ *Id.* at 673. Stilloe had entered into a written contract with the McMahons to remove personal property, debris, and other stored materials before the closing of the property sale. *Id.* In addition, the contract stated that, if the EPA required Stilloe to perform removal of the materials mentioned in the contract, the McMahons would reimburse Stilloe for expenses. *Id.*

¹⁷⁶ *Id.* at 676. The court held that the barrels were abandoned when the McMahons failed to comply with their written contract with Stilloe. *Id.* at 674; see Lipinski, *supra* note 8, at 112.

¹⁷⁷ *Almy Bros., Inc.*, 866 F. Supp. at 676 (quoting *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992)). The court refused to adopt an interpretation that would create liability for a current owner who took no affirmative action with the barrel while a former owner would face no liability at all. *Id.*; see *Nurad, Inc.*, 966 F.2d at 845.

¹⁷⁸ *Almy Bros., Inc.*, 866 F. Supp. at 676. After reviewing an affidavit regarding the widespread contamination of the property around the areas where the drums were located, as well as Mr. McMahon's testimony regarding the movement of the barrels, the court found that the barrels were leaking during the McMahons' ownership. *Id.* at 677.

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* note 60 (listing cases arguing for the active interpretation of "disposal").

¹⁸¹ 96 F.3d 706 (3d Cir. 1996).

¹⁸² 806 F. Supp. 1346 (N.D. Ill. 1992).

¹⁸³ *CDMG Realty Co.*, 96 F.3d at 718; *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1352.

the two-step process of disposal envisioned by Congress; and (5) the concepts of release and disposal.¹⁸⁴

In *CDMG Realty Co.*, the land in question was formerly part of a municipally-operated landfill that received hazardous chemical waste from pharmaceutical and chemical companies.¹⁸⁵ The landfill was closed in 1972 after numerous complaints about odor, fires, lack of proper cover, and dead animals.¹⁸⁶ In 1981, Dowel Associates purchased the landfill property, which was vacant at the time of purchase and which remained vacant while owned by Dowel.¹⁸⁷ In 1987, Dowel sold the property to HMAT, disclosing that the property was once part of a landfill and that the site was under investigation as a possible Superfund site.¹⁸⁸ Subsequently, HMAT was sued for cleanup costs and filed a third-party suit against Dowel for contribution.¹⁸⁹ In reaching its decision, the court focused on: (1) the language of CERCLA; (2) the innocent owner defense; and (3) the goals of CERCLA.¹⁹⁰

1. The Language of CERCLA: Rules of Statutory Construction

The Third Circuit began its interpretation in *CDMG Realty* by examining the language of the statute's definition of "disposal."¹⁹¹ The court began by using *noscitur a sociis*, a canon of statutory construction that means that one can infer the meaning of a word by examining the surrounding words.¹⁹² The words "discharge," "deposit," "injection,"

¹⁸⁴ See discussion *infra* Part III.B.1-5.

¹⁸⁵ *CDMG Realty Co.*, 96 F.3d at 711. The landfill received approximately 750,000 pounds of hazardous chemicals from a pharmaceutical company, along with 3,000,000 gallons of wastewater from a chemical company. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* Neither Dowel nor anyone else deposited waste at the site during Dowel's ownership, and its only activity on the property was soil investigation to determine if the land could support construction. *Id.* Dowel was then notified that the property was going to be investigated for environmental contamination and that it was potentially a liable party. *Id.*

¹⁸⁸ *Id.* at 712.

¹⁸⁹ *Id.* HMAT was a PRP because it was the current owner of the property, and it argued that Dowel should be held liable as a former "owner at the time of disposal." *Id.*

¹⁹⁰ *Id.* at 714, 716, 717.

¹⁹¹ *Id.* at 714; see *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) (using the principles of statutory construction by noting that "our starting point must be the language employed by Congress"); *Richards v. United States*, 369 U.S. 1, 9 (1962) (stating that courts begin with the assumption that "the legislative purpose is expressed by the ordinary meaning of the words used").

¹⁹² *CDMG Realty Co.*, 96 F.3d at 714; see *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989) (reading the word "disposal" to include only active participants based on

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"dumping," and "placing" all "envision a human actor."¹⁹³ Based on the principle of *noscitur a sociis*, the proper connotation to give words that are more ambiguous, "spilling" and "leaking," for example, is that of the surrounding words, which the court found have active connotations.¹⁹⁴ Accordingly, the court rejected the possibility that passive migration could constitute "disposal" because the two words that arguably have a passive connotation, "spilling" and "leaking," must be read as active due to the surrounding words.¹⁹⁵

In addition to *noscitur a sociis*, another canon of statutory construction, *ejusdem generis*, supports an interpretation of "disposal" including only active conduct.¹⁹⁶ Using this principle, the general terms "spill" and "leak" in the definition of "disposal" must be read as analogous to the specific terms (i.e. "deposit," "dump," and "place").¹⁹⁷ This results in all of the words in the definition having an active meaning.¹⁹⁸

the totality of the meaning when the words in the definition are read together); *see also* Irwin, *supra* note 4, at 161. Before applying a statute, a court must look at statutory construction. Irwin, *supra* note 4, at 161. If the language is plain, then the court must enforce the statute accordingly. *Id.*

¹⁹³ CDMG Realty Co., 96 F.3d at 714; *see* Bronston, *supra* note 4, at 616.

¹⁹⁴ Bronston, *supra* note 4, at 616. According to this principle, the words "discharge, deposit, injection, dumping, and placing" indicate the proper connotation of spilling and leaking. *Id.* All of these verbs envision a human actor and, therefore, indicate that Congress intended an active version of these words. *Id.*; *see* Lipinski, *supra* note 8, at 99 (discussing an earlier decision by this same court that cautioned against relying on canons of statutory construction when interpreting CERCLA due to its "inartful crafting").

¹⁹⁵ CDMG Realty Co., 96 F.3d at 714. The court also made the point that, although both spilling and leaking can occur without a human actor, neither of them "denote the gradual spreading of contamination alleged" in this case. *Id.* The court did not decide that passive migration could never constitute "disposal" but held more narrowly that it did not in this case. *Id.* "Leak" in this case was not applicable because there was no opening in the container, and, likewise, "spill" did not apply because it is a sudden rush, not a gradual movement as was present in this case. *Id.*; *see* Lipinski, *supra* note 8, at 99.

¹⁹⁶ Bronston, *supra* note 4, at 616; *see* Smith v. Davis, 323 U.S. 111, 117 (1944) (declaring that the canon *ejusdem generis* is used to construe general words as having the same meaning as those words specifically defined); *see also* Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117, 129 (1991) ("Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enunciation.").

¹⁹⁷ Bronston, *supra* note 4, at 616-17. The common element of these terms is that they are carried out by a person, rendering "disposal" a word that requires active conduct. *Id.*; *see*, 2A NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 47.17 (6th ed. 2000); *see also* Irwin, *supra* note 4, at 155.

¹⁹⁸ Bronston, *supra* note 4, at 616.

The court further supported its active theory interpretation by examining the word "release" and noting that the term "leaching" is used in its definition but is not used in the definition of "disposal."¹⁹⁹ The court found that the inclusion of "leaching" in the definition of "release" confirms that Congress was aware of the term and of the concept of passive migration and, further, that Congress could have explicitly expressed the concept if it had so desired.²⁰⁰ Because of this awareness, the court concluded that, if Congress had intended to include passive migration in the liability scheme of CERCLA, it would have included the word "leaching" in the definition of "disposal," or it would have created liability based on release and not disposal.²⁰¹

2. Analysis of the Innocent Landowner Defense Under Active Migration

The *CDMG Realty* court relied upon the innocent owner defense and stated that the defense would be rendered meaningless if "disposal" were interpreted under the passive theory.²⁰² To be entitled to the defense, the defendant must have purchased the facility after the "disposal" of the hazardous waste, but if "disposal" includes passive migration—the constant spreading of contaminants—there would be no point in time after "disposal," making the defense theoretically impossible.²⁰³ The court concluded that Congress would not have intended to create a useless defense and, therefore, must not have intended passive migration to be included in the definition of "disposal."²⁰⁴ Others, however, argue that the innocent landowner

¹⁹⁹ *CDMG Realty Co.*, 96 F.3d at 715. The word "leaching" is commonly used in the environmental context to describe the migration of contaminants. *Id.* Leaching is "the process or an instance of separating the soluble components from some material by percolation." *Id.* Leaching through rain and groundwater is the principle cause of contaminant movement in landfills. *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 716; see *supra* note 50 for criteria of the innocent landowner defense; see also *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1352 (N.D. Ill. 1992) (arguing in favor of the active theory because otherwise the innocent owner defense would be rendered useless).

²⁰³ *CDMG Realty Co.*, 96 F.3d at 716; see *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358 (2d Cir. 1997); see also Lipinski, *supra* note 8, at 102. The court also concluded that, because the defense is limited to current owners, passive migration is not included in "disposal." Lipinski, *supra* note 8, at 101-02.

²⁰⁴ *CDMG Realty Co.*, 96 F.3d at 716; see Bronston, *supra* note 4, at 628. By referring to a time after "disposal," Congress clearly envisioned "disposal" as an act with distinct beginning and ending points. Bronston, *supra* note 4, at 628. Congress also showed that

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defense allows for the purchase of land after the "disposal" or placement of the contamination and that the defense has validity because placement could be considered a one-time event.²⁰⁵ In response, the *CDMG Realty* court held that because the word "placement" is included in the definition of "disposal," the use of the word "placement" in the language of the innocent landowner defense is redundant.²⁰⁶ The court solidified its position regarding the innocent landowner defense by drawing a comparison between current and past owners of a contaminated property.²⁰⁷ After considering the inconsistencies that would be created for these parties if passive migration were included in the definition of "disposal," the court concluded that Congress did not intend such an irrational regime.²⁰⁸

3. Principal Goals of CERCLA

Finally, the *CDMG Realty* court looked at CERCLA's principal goals, specifically, forcing polluters to pay for their pollution.²⁰⁹ The court

"disposal" and "placement" are similar concepts, both requiring an affirmative act. *Id.* Both of these concepts reaffirm that Congress intended "disposal" to require active conduct. *Id.*

²⁰⁵ *CDMG Realty Co.*, 96 F.3d at 716 n.7.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 717. The court hypothesized that, if "disposal" excludes passive migration, then past owners will generally only be liable as "owners at the time of disposal" if they have committed an affirmative act of "disposal" on the property. *Id.* They would then have no need for an innocent landowner defense because they had committed an affirmative act of "disposal" and would not be able to meet the criteria to assert it. *Id.* The necessary criteria include not contributing to the contamination of the property, exercising due care with respect to the hazardous substance, and taking precautions against foreseeable acts or omissions of third parties. *Id.* On the other hand, if prior owners were being held liable for waste that spread passively during their ownership, and the innocent landowner defense was only available to current owners, then the past owners would be worse off than the current owners, even if they did not know that the contamination was present. *Id.*; see 42 U.S.C §§ 9601(35), 9607(6) (2000).

²⁰⁸ *CDMG Realty Co.*, 96 F.3d at 717; see Rita H. McMillen, *Liability for "Passive" Disposal of Hazardous Substances Under CERCLA*, 42 *DRAKE L. REV.* 255, 274 (1993). Under the principle of fairness, a person who merely owns property in a chain of title should not be responsible for costs associated with cleanup of the contamination. McMillen, *supra*, at 274. The person did not benefit from the "disposal" and would not benefit from the cleanup because the person no longer owns the property. *Id.* It would thus be "unfair" to hold that person liable for response costs. *Id.*

²⁰⁹ *CDMG Realty Co.*, 96 F.3d at 717. Though CERCLA was passed with two principal goals, facilitating cleanup and forcing polluters to pay, the court focused on the second one to show that its holding was consistent with CERCLA. *Id.*; see Lipinski, *supra* note 8, at 104 (explaining that the decision will further advance the goals of CERCLA as a strict liability statute because present owners will remain liable for cleanup costs).

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determined that a person who owned property that was previously contaminated and who played no part in spreading the waste could not be characterized as a polluter.²¹⁰ The *CDMG Realty* court, therefore, ruled that "disposal" does not include passive migration.²¹¹

In *Petersen*, the United States attempted to recover funds spent on the remedial investigation of a site operated by Petersen.²¹² In 1982, the Forest Preserve District chose the Petersen land as the site for a recreational lake and uncovered a storage barrel during construction.²¹³ The EPA investigated and held the Forest Preserve liable for the cleanup of the site.²¹⁴ After the Forest Preserve's initial cleanup, the EPA investigated and determined that, while the site did contain hazardous substances above naturally occurring levels, the site was basically safe.²¹⁵ The United States sued Peterson, claiming that it was responsible for the costs of the investigation because it operated the site when passive disposal occurred.²¹⁶ In reaching its decision, the court relied upon the

²¹⁰ *CDMG Realty Co.*, 96 F.3d at 717. The court argued that excluding these individuals from liability under CERCLA would not let the actual polluters off the hook. *Id.* If the contamination is disclosed in the process of selling the land, then the selling price will reflect the cost of CERCLA liability. *Id.* If the contamination is not revealed, and the seller has knowledge of it, then the seller is liable for response costs, even after the transfer. *Id.* The only prior owners who will avoid paying all cleanup costs are those who bought and sold the land with no knowledge of the contamination. *Id.*; see *Bronston*, *supra* note 4, at 637.

The active reading of disposal ensures that liability under section 107(a)(2) rests squarely where it belongs: on the environmental polluters who created the risk that hazardous waste would enter the environment and who received the economic benefits of doing so, and on those who discovered the contamination but refused to take action to remedy the problem.

Bronston, *supra* note 4, at 637.

²¹¹ *CDMG Realty Co.*, 96 F.3d at 718. Although the court ruled that the passive theory was incorrect, it did find that the boring of holes into the soil, which HMAT performed while conducting the soil investigation, may be a form of "disposal" under the active theory that CDMG could pursue. *Id.* at 719. The court stated that "[d]isposal" thus includes not only the initial introduction of contaminants onto a property but also the spreading of contaminants due to subsequent activity." *Id.* Therefore, soil testing that disperses contaminants may constitute "disposal." *Id.* at 722.

²¹² 806 F. Supp. 1346, 1348 (N.D. Ill. 1992). Allegedly, Petersen allowed hazardous waste to be disposed of in an area of land that was used to mine sand and gravel. *Id.*

²¹³ *Id.* The barrel was uncovered when it was struck by a bulldozer during construction. *Id.*

²¹⁴ *Id.* The Forest Preserve cleaned up the site through a private contractor. *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 1349. The action brought by the United States was for more than \$800,000 for the investigation. *Id.* Petersen then "filed a third-party complaint for contribution from seven

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reasoning of the CDMG court, while also focusing on: (1) the two-step process of disposal envisioned by Congress and (2) the concepts of release and disposal.²¹⁷

4. Two-Step Process of Disposal

The court acknowledged that holding more parties liable for cleanup might further CERCLA's objectives but noted that courts must recognize that statutes have "not only ends, but also limits."²¹⁸ The court held that passive disposal does not trigger liability and found that the definition of "disposal" justified this conclusion.²¹⁹ The court noted that the definition of "disposal" states that waste "may enter the environment or be emitted into the air or discharged into any waters."²²⁰ But the migration inherent in passive disposal is "itself an entering of the environment; it is not a predicate to entering the environment."²²¹ The court found this to be persuasive in interpreting "disposal" under the active theory.²²²

5. Release v. Disposal

Further, the court in *Petersen*, like the CDMG Realty court, discussed the relationship between the terms "release" and "disposal" and held

defendants." *Id.* Most of these third-party defendants were allegedly liable for the disposal of fly ash, a hazardous byproduct of coal combustion. *Id.* In order for the United States to recover from Petersen, CERCLA requires it to show that "there was a 'release' or 'threatened release' of a 'hazardous substance,'" that the site is a facility, that "the release caused the United States to incur response costs," and that Petersen is a responsible party. *Id.*; see 42 U.S.C. § 9607(a) (2000).

²¹⁷ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351-53.

²¹⁸ *Id.* at 1350. Laws such as CERCLA do not operate to pursue their ends to the logical limits, and it is the job of the courts to enforce stopping points. *Id.* at 1351. The additional parties that could be added are those who own or operate the land while passive migration is taking place but who did not dispose of hazardous substances themselves. *Id.*; see Bronston, *supra* note 4, at 636.

²¹⁹ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351; see Bronston, *supra* note 4, at 618. In the definition of "disposal," Congress envisioned a two-step process. Bronston, *supra* note 4, at 618. First, the polluter disposes of the waste, and then the pollution actually leaches into the environment. *Id.*; see also May, *supra* note 4, at 393; Traylor, *supra* note 6, at 558 (arguing that passive migration fails the two-part test established by Congress).

²²⁰ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351; see 42 U.S.C. § 9601(22) (2000).

²²¹ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351. The court argued that Congress was aware of this difference when it defined the term "release" in the statute. *Id.*; see Bronston, *supra* note 4, at 618 (arguing that if the process of migration is itself "disposal," then the second step of the definition is meaningless and goes against Congress' intent of creating a two-step process).

²²² *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351.

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this to be illustrative of congressional intent.²²³ The definition of "release" encompasses more events than the definition of "disposal," making the concept of the former broader than that of the latter.²²⁴ Therefore, while every "disposal" could qualify as a "release," every "release" would not constitute a "disposal."²²⁵ Under this theory, if no second-hand movement of a contaminant at a facility is required to be an affirmative and voluntary action to be classified as "disposal," then a danger exists of collapsing "disposal" into "release."²²⁶ Because of this definitional difference between the two terms, courts have held, and commentators have insisted, that Congress must have intended a distinction.²²⁷ The term "release" is used to activate the entire response scheme for CERCLA.²²⁸ On the other hand, the statute limited operator liability to those operating a facility at the time of "disposal."²²⁹ Because Congress limited liability to operators during "disposal," but not "release," the court concluded that the distinction Congress intended was between active and passive events.²³⁰

Next, the *Petersen* court, like the *CDMG Realty* court, discussed the innocent owner defense.²³¹ The court concluded that, for the defense to

²²³ *Id.* The term "release," in its definition includes the word "disposal," but the definition of "disposal" does not include "release." *Id.*

²²⁴ *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir. 1996); see *Bronston*, *supra* note 4, at 631. The fact that "release" has both active and passive words in its definition and that it includes "disposal" leads to the conclusion that Congress intended "release" to be broader than "disposal." *Bronston*, *supra* note 4, at 631; *May*, *supra* note 4, at 393; see also *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351 (agreeing that the word "release" includes certain types of passive migration but arguing that, because "release" is a broader concept than "disposal," the same inclusion of passive migration does not hold true for "disposal").

²²⁵ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351; see *May*, *supra* note 4, at 393.

²²⁶ *Redwing Carriers, Inc. v. Saraland Apts., Ltd.*, 875 F. Supp. 1545, 1563 (S.D. Ala. 1995).

²²⁷ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351; *Bronston*, *supra* note 4, at 632. Because "release" contains passive components, it makes sense to limit "disposal" to an active meaning. *Bronston*, *supra* note 4, at 632. If "disposal" is interpreted to include passive migration, then "disposal" and "release" become essentially interchangeable terms with no difference between them. *Id.*

²²⁸ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351; see 42 U.S.C. § 9607(a)(4) (2000).

²²⁹ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351; see *Lipinski*, *supra* note 8, at 100 (commenting on the distinction between "disposal" and "release" as defined by Congress); see also *supra* note 40 for the listing of liable parties under CERCLA.

²³⁰ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351; see *United States v. CDMG Realty Co.*, 96 F.3d 706, 716 (3d Cir. 1996).

²³¹ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1351-52. This defense can be used if the property is acquired by the defendant "after the disposal or placement of the hazardous substances on, in, or at the facility," and if, at that time the defendant acquired the facility, "the defendant did not know and had no reason to know that any hazardous substance

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be effective, "disposal" requires active participation; otherwise, "any seeping or leaking on a site occurring after the purchase would eliminate the defense."²³²

Further, the court rejected the suggestion that the active theory would allow owners who do nothing to stop the spread of hazardous waste through a property to avoid liability.²³³ The court maintained that the innocent owner defense would not be available to an owner with actual knowledge of a release who later transferred the property without disclosing the release.²³⁴ Moreover, the *Petersen* court noted that purchasers have an incentive to investigate for contamination before purchasing land and that state common law would protect purchasers from an owner who failed to disclose contamination.²³⁵ The court concluded that purchasers have an incentive to investigate because contaminated property is more difficult to resell than uncontaminated land.²³⁶

6. Cases Supporting CDMG Realty and *Petersen*

Other cases have followed the reasoning of the *Petersen* and CDMG Realty courts and found that "disposal" includes only active conduct.²³⁷ In *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*,²³⁸ ABB bought a piece of property and tested it for hazardous chemical contamination.²³⁹

which is the subject of the release or threatened release was disposed of on, in, or at the facility." *Id.* at 1352; see also 42 U.S.C. § 9601(35)(A) (2000).

²³² *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1352. Because passive migration is constantly at work, "this defense would be available only to innocent owners who are fortunate enough to have purchased a facility where all the hazardous waste is sealed in concrete." *Id.*; see Irwin, *supra* note 4, at 163 (giving "disposal" a passive meaning would defeat the purpose of the innocent landowner defense).

²³³ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1353; see Irwin, *supra* note 4, at 168. CERCLA has not preempted all state environmental law, and liability could still be imposed by the state on an owner who does not fully disclose information regarding the contamination of the property to a potential buyer. Irwin, *supra* note 4, at 168. Some states, such as New Jersey, have enacted full disclosure laws. *Id.* Although these laws may be in place, it is still always in the best interest of a buyer to protect himself by investigating the land or providing a contingency in the purchase agreement. *Id.*

²³⁴ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1353; see Bronston, *supra* note 4, at 639 (commenting that CERCLA provides incentives for potential buyers to inspect the property and guard against liability).

²³⁵ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1353. See generally 42 U.S.C. § 9601(35). The innocent landowner defense requires that the person asserting the defense did not know or have reason to know that the facility was contaminated and that all appropriate inquiries regarding the facility were made. *Id.*

²³⁶ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1353.

The test results indicated that contamination occurred both before and after ABB acquired the property, and ABB then began an extensive cleanup of the site.²⁴⁰ ABB argued, however, that the previous owners were liable under CERCLA for passive migration of contaminants occurring during their ownership.²⁴¹ The ABB court followed the reasoning of the *CDMG Realty* court and noted that none of the terms in the definition of "disposal" refer to "gradual spreading of hazardous chemicals already in the ground."²⁴² The court additionally cited *CDMG Realty* and used its arguments regarding the distinction between "disposal" and "release," the implication that the innocent landowner defense would be rendered useless under the passive interpretation, and, finally, that the passive interpretation of "disposal" would be inconsistent with the policies of CERCLA.²⁴³ In borrowing past arguments advocating an active interpretation of "disposal," the ABB court reaffirmed the previous rulings.²⁴⁴

Likewise, the court in *Ecodyne Corp. v. Shah*²⁴⁵ agreed with the active interpretation of "disposal" and concurred with the reasoning of the previous decisions giving the statute such an interpretation.²⁴⁶ While Ecodyne owned a parcel of land, the company constructed wooden water tower tanks and treated the wood with a chemical preservative containing hazardous substances.²⁴⁷ Ecodyne soon discovered that the chemicals had leaked into the ground, resulting in elevated levels of chemicals in the groundwater.²⁴⁸ Ecodyne reported this discovery to the proper authorities and developed a plan for remedial action.²⁴⁹ Several

²³⁷ See *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351 (2d Cir. 1997); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454 (N.D. Cal. 1989).

²³⁸ *ABB Indus. Sys., Inc.*, 120 F.3d 351.

²³⁹ *Id.* at 354.

²⁴⁰ *Id.* Since the testing indicated that the contamination may have occurred prior to ABB's ownership, ABB researched the prior ownership of the property and sued the prior owners under CERCLA for remedial costs. *Id.*

²⁴¹ *Id.* ABB alleged that hazardous chemicals, which a prior owner had spilled, continued to spread while the other owners controlled the property. *Id.* at 357.

²⁴² *Id.* at 358. The court refused to express an opinion on the term "leaking" as used when a prior owner acquired a site with leaking barrels, even if the owner's actions were purely passive. *Id.*; see *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir. 1996).

²⁴³ *ABB Indus. Sys., Inc.*, 120 F.3d at 358 (citing *CDMG Realty Co.*, 96 F.3d at 716).

²⁴⁴ *Id.*

²⁴⁵ 718 F. Supp. 1454 (N.D. Cal. 1989).

²⁴⁶ See Lipinski, *supra* note 8, at 105.

²⁴⁷ *Ecodyne Corp.*, 718 F. Supp. at 1455.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

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months later Ecodyne sold the property to Shah at a reduced price.²⁵⁰ The property was then sold several more times, each time at a reduced cost in consideration of the new owner assuming responsibility for the contamination problems.²⁵¹ The conditions at the property only worsened, however, and by the time of suit, Ecodyne had been ordered to clean up the site.²⁵² Ecodyne then sought recovery costs from past owners of the property.²⁵³ The court, following the reasoning of the *CDMG Realty* court, applied a canon of statutory construction, *noscitur a sociis*, and found that the language of the definition of "disposal" implies an active element.²⁵⁴ Next, the court noted that, if "disposal" includes passive migration, then § 9607(a), which lists the categories of PRPs, becomes a catchall provision that makes all owners after the initial contamination liable regardless of whether they contributed to the contamination.²⁵⁵ This reasoning led the *Ecodyne* court to conclude that all of the words in the definition of "disposal" require someone to affirmatively do something with the hazardous substance and, therefore, that CERCLA liability requires an active reading of "disposal."²⁵⁶

IV. ANALYSIS: WHY THE PASSIVE AND ACTIVE VOCABULARY IS AN INEFFECTIVE WAY TO LOOK AT "DISPOSAL"

It is "contrary to CERCLA's remedial scheme to draw an arbitrary line between current owners, who would be liable regardless of culpability, and past owners, who would be liable only if they were culpable."²⁵⁷ The arbitrary line that has thus far been drawn is between active and passive disposal. This Note proposes that this is not the proper way to look at the word "disposal." Regardless of whether "disposal" is analyzed using the active or the passive interpretation, both

²⁵⁰ *Id.* The property was sold for \$1.45 million, a price allegedly reduced by \$1.5 million. *Id.* The reduced price was in consideration of the fact that Shah would assume responsibility for cleaning up the contamination at the property. *Id.* at 1455-56.

²⁵¹ *Id.* at 1456.

²⁵² *Id.*

²⁵³ *Id.* The defendants claimed that they did not own the property at the time of the "disposal," but the plaintiffs contended that the migration of the chemicals during their ownership should be enough for "disposal." *Id.*

²⁵⁴ *Id.* at 1457; see *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir. 1996).

²⁵⁵ See Lipinski, *supra* note 8, at 105.

²⁵⁶ *Ecodyne Corp.*, 718 F. Supp. at 1457. The court concluded that, no matter how broad Congress may have intended the definition of "disposal" to be, that intention does not justify distorting the statute. *Id.* Instead of relying on legislative history, the court applied statutory and grammatical interpretation to reach its conclusion. *Id.*

²⁵⁷ Stempien, *supra* note 6, at 11.

create problems that are contrary to the purposes and language of CERCLA. This part analyzes the arguments that have been set forth advocating both the passive and active interpretations of "disposal."²⁵⁸ Part IV.A discusses the problems that exist when courts rely on statutory interpretation to discover legislative intent.²⁵⁹ Part IV.B discusses the problems that are created by using the passive interpretation of "disposal," including the contradiction of the innocent owner defense and the Fairness Doctrine.²⁶⁰ Part IV.C discusses the problems that are created when using the active interpretation of "disposal," including the frustration of CERCLA's purpose and the inconsistent treatment of the parties involved.²⁶¹ This part concludes that both the passive and the active interpretations of "disposal" create far too many inconsistencies and are an ineffective and inappropriate means of interpreting "disposal" when determining who should be held liable under CERCLA.²⁶²

A. *The Language of CERCLA: Statutory Interpretation at Its Worst*

Statutory interpretation involves the search for legislative meaning.²⁶³ The starting place to determine what a statute means should be the language of the statute.²⁶⁴ If the language in the statute is clear, then the inquiry should end, but if the language is unclear, or the plain meaning of the statute cannot be applied, then the inquiry needs to continue.²⁶⁵ To give statutes meaning when their plain language is

²⁵⁸ See *infra* Part IV.

²⁵⁹ See *infra* Part IV.A.

²⁶⁰ See *infra* Part IV.B.

²⁶¹ See *infra* Part IV.C.

²⁶² See *infra* Part V for a more accurate way to analyze this problem.

²⁶³ ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 6 (1997).

²⁶⁴ *Id.* at 9; see *Caminetti v. United States*, 242 U.S. 470, 485 (1917). "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed." *Caminetti*, 242 U.S. at 485; KENT GREENAWALT, LEGISLATION STATUTORY INTERPRETATION: 20 QUESTIONS 36-37 (1999). The words of the statute are important because they are what was voted on and enacted, they are most easily available to the public, and they are the most solid indication of what the legislature wanted to do. GREENAWALT, *supra*, at 36-37; see also *Mallard v. United States Dist. Court for the S. Dist. Of Iowa*, 490 U.S. 296, 300 (1989).

²⁶⁵ *Caminetti*, 242 U.S. at 485. If the statute is "plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Id.*; see MIKVA & LANE, *supra* note 263, at 10. Sometimes the plain language of a statute cannot be applied because it will cause absurd consequences or go against legislative intent. MIKVA & LANE, *supra* note 263, at 10. An example of such consequences is a statute prohibiting blood in the streets that cannot be

unclear, many courts use canons of statutory construction—general presumptions about legislative intent—or they rely on the legislative history of the statute.²⁶⁶ When the language of the statute is unclear, the next step, according to the rules of statutory construction, is to look for legislative intent in the legislative history of the statute.²⁶⁷ Unfortunately, CERCLA has little or no legislative history.²⁶⁸ Moreover, some commentators argue against the use of legislative history to determine the intent of the legislature.²⁶⁹ Because CERCLA has no legislative history, many courts use canons of statutory construction to discover the meaning of the statute.²⁷⁰

Courts frequently use canons of statutory construction to determine legislative intent when it is not clear from the language of the statute or

held applicable to emergency surgery. *Id.* Judge Posner has commented that “[m]eaning depends on context as well as on the semantic and other formal properties of sentences.” *Id.* There are several reasons why the meaning of language in a statute would be unclear. *Id.* at 20-22. These include the following: (1) “words are not perfect symbols of communication of ideas;” (2) “statutes are, for the most part, drafted in general terms, addressing categories of conduct;” (3) “legislatures sometimes use general language, contemplating that it will be defined by administrative agencies;” (4) “legislative compromises are struck to secure votes for enactment;” and (5) “ambiguities are created because the legislature has given insufficient thought to the meaning of the language employed or because it simply has not considered the question that has become the subject of litigation.” *Id.*; see also *Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988); *GREENAWALT*, *supra* note 264, at 45-57 (commenting that the purpose of the statute does not always match with the language, and judges have occasion to decide against the plain language of the statute).

²⁶⁶ *MIKVA & LANE*, *supra* note 263, at 22. Canons of statutory construction are “judicially crafted maxims for determining the meaning of statutes. *Id.* at 23. In the case of *Portland General Electric Co. v. Bureau of Labor & Industries*, 859 P.2d 1143 (Or. 1993), the court laid out the level of interpretation analysis for statutes: “1. the text and context of the statutory provision, as a starting point; 2. the legislative history, if, but only if, the intent is not clear from the text and context legislative; 3. canons of construction, if legislative history does not provide an answer.” *Id.* at 50.

²⁶⁷ See *Portland Gen. Elec. Co.*, 859 P.2d 1143; *MIKVA & LANE*, *supra* note 263, at 22.

²⁶⁸ See *supra* Part II.A for a discussion of CERCLA’s legislative history.

²⁶⁹ *GREENAWALT*, *supra* note 264, at 177. There are several arguments against using legislative history to determine the intent of the legislature. These arguments include the following: (1) “legislatures enact statutes, not legislative history;” (2) “legislative history is insufficiently accessible or of little value;” (3) “the history is too easily subject to manipulation or misperception;” (4) “its use breeds poor drafting and irresponsible legislative activity;” (5) “constitutional values preclude legislatures’ effectively delegating responsibility for statutory meaning to subgroups of legislators.” *Id.*; see *WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION* 16 (1994) (commenting that legislative intent is usually not recorded).

²⁷⁰ See *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir. 1996).

from the legislative history.²⁷¹ Though they are used regularly, canons of statutory construction are disfavored, and many commentators criticize them for creating an unwarranted presumption of legislative intent.²⁷² The consensus is that canons may provide some guidance for courts and the legislature, but that they should not be used as strict rules of interpretation.²⁷³

In the case of CERCLA, and, more specifically, its liability provisions and the term "disposal," advocates for both the passive interpretation and the active interpretation have tried to use the statutory language to defend their positions.²⁷⁴ Those advocating passive migration as "disposal" have argued that the plain language of the statute is clear and that the courts have a duty to enforce the statute as written.²⁷⁵ The court in *Nurad* concluded that it was bound to follow the language of the statute and include passive migration in the definition of "disposal" because words such as "discharge," "leak," and "spill" all have passive components.²⁷⁶ Moreover, the court was bound to the passive interpretation of "disposal" because the RCRA cases found "disposal" to include passive migration.²⁷⁷

²⁷¹ MIKVA & LANE, *supra* note 263, at 22; *see* GREENAWALT, *supra* note 264, at 201. Canons of statutory construction can be divided into several categories. GREENAWALT, *supra* note 264, at 201. William Eskridge divided them into the following: "precepts of grammar, syntax, and logical inference (the textual canons); rules of deference to the interpretations others have placed on the statutory language (the extrinsic source canons); and policy rules and presumptions (the substantive canons)." *Id.*

²⁷² MIKVA & LANE, *supra* note 263, at 26. Richard Posner has said of them, "the usual criticism of the canons . . . is that for every canon one might bring to bear on a point there is an equal and opposite canon, so that the outcome of the interpretive process depends on the choice between paired opposites—a choice the canons themselves do not illuminate." *Id.* at 25. In addition, Karl Llewellyn has said that "there are two opposing canons on almost every point." *Id.*; *see* ESKRIDGE, *supra* note 269, at 16-47 (discussing the many different theories of statutory construction that are used); *see also* GREENAWALT, *supra* note 264, at 203 (describing some common objections to the use of canons stating that "[t]he canons are no help, they do not reflect ordinary use of language, and that they conflict with each other").

²⁷³ GREENAWALT, *supra* note 264, at 205. Karl Llewellyn has said that canons cannot be taken as infallible rules but only as aids in context. *Id.* Canons can give legal guidance about achieving objectives, but they are "too uneven to provide much assurance about the way particular language will be interpreted if its apparent meaning is unclear." *Id.* at 211.

²⁷⁴ *See* CDMG Realty Co., 96 F.3d at 714; *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992).

²⁷⁵ *Nurad, Inc.*, 966 F.2d at 845.

²⁷⁶ *Id.*; *see* *Carson Harbor Vill., Ltd. v. Unocal*, 227 F.3d 1196, 1206 (9th Cir. 2000).

²⁷⁷ 42 U.S.C. § 9601(29) (2000). The term "disposal" shall have the meaning provided in RCRA. *Id.*; *see* *Nurad*, 966 F.2d at 845 (commenting that RCRA and CERCLA both have similar goals—to clean up hazardous waste conditions).

In contrast, the courts that have found that “disposal” requires an affirmative act have concluded that the language of the statute is unclear and have relied upon two canons of statutory construction to read the statute as supporting their position. The two canons that have been used are *noscitur a sociis* and *ejusdem generis*.²⁷⁸ Using these canons, the court in *CDMG Realty* found that the terms “leak” and “spill,” which some courts found to have a passive component, must be read in the context of the other words in the definition and must take their meaning from those other words.²⁷⁹ Therefore, “leak” and “spill” in the definition of “disposal” must also have an active meaning.²⁸⁰

As many commentators have noted, the problem with relying on statutory construction is that advocates on both sides of an issue can manipulate the language of the statute and use the canons of construction to reinforce their positions. That the language of CERCLA is unclear is exemplified by the vast amount of litigation the statute has triggered.²⁸¹ Therefore, the argument that the plain language of the statute requires the court to include passive migration is incorrect.²⁸² The words used in the definition of “disposal” have both active and passive components, and there is no indication of congressional intent in the language of the statute itself.²⁸³

Next, courts can attempt to discover legislative intent by looking at the legislative history of a statute, but CERCLA’s utter lack of legislative history offers little guidance.²⁸⁴ CERCLA was passed quickly and was the product of a compromise by the House and the Senate.²⁸⁵ The legislative history has been described as ambiguous at best, making it

²⁷⁸ GREENAWALT, *supra* note 264, at 202. Both of these canons fall into the category of textual canons, focusing on grammar, syntax, and logical inference. *Id.* at 201. *Noscitur a sociis* is “the meaning of a word may be ascertained by reference to the meaning of the words associated with it.” *Id.* at 202. *Ejusdem generis* is “when words of a particular or specific meaning are followed by general words, the general words are construed to apply only to persons or conditions of the same general kind as those specifically mentioned.” *Id.*

²⁷⁹ *CDMG Realty Co.*, 96 F.3d at 714.

²⁸⁰ *Id.*

²⁸¹ See *supra* Part III (discussing the cases involved in the circuit split regarding “disposal” in CERCLA’s liability provision).

²⁸² See *Nurad, Inc.*, 966 F.2d at 845.

²⁸³ See *supra* notes 191-194 (discussing congressional intent and the drafting of CERCLA).

²⁸⁴ See *supra* note 194 (cautioning that statutory construction is dangerous considering CERCLA’s lack of clarity in its drafting).

²⁸⁵ See *supra* Part II.A (discussing CERLA’s legislative history).

difficult, if not impossible, to uncover legislative intent.²⁸⁶ Because CERCLA's language and legislative history are ambiguous, courts have used canons of statutory construction to interpret "disposal" as requiring an affirmative act.²⁸⁷

The use of canons to discern the intent of the legislature is not highly regarded. Conclusions based on canons cannot yield authoritative evidence of legislative intent because canons can be used to manipulate language; canons are simply assumptions based on no real knowledge.²⁸⁸ For every canon that one side uses, the other side can find a different canon that will support an opposite conclusion.²⁸⁹ Proponents of both the passive and the active interpretation believe their arguments settle the meaning of "disposal." But because each side's argument can be negated by the other's, the arguments based on the language of CERCLA and on canons of construction do not conclusively resolve the issue of CERCLA liability.

B. Problems Created by the Passive Interpretation of "Disposal"

1. Analysis of the Innocent Landowner Defense

Under the passive interpretation of "disposal," the innocent landowner defense, which Congress explicitly placed in CERCLA, is rendered "merely surplusage."²⁹⁰ To assert the innocent landowner defense, the property in question must have been acquired "after the disposal or placement of the hazardous substance."²⁹¹ A problem arises because, under the passive interpretation, "disposal" includes passive migration or the continuous spreading of hazardous waste through the property. Because this migration is considered "disposal" and because it is a continuous process, land can never be purchased "after the disposal" of the hazardous waste.²⁹² By effectively abolishing the innocent landowner defense, the passive theory contravenes Congress' intention of exempting from liability those parties who acquired land after the

²⁸⁶ See APPLGATE, *supra* note 16, at 886 (explaining that "the result [of the hurried passage of the statute] was unclear draftsmanship and very little legislative history"); Grad, *supra* note 29, at 2.

²⁸⁷ See *infra* Part III.B.1 for the courts' use of statutory construction in interpreting "disposal."

²⁸⁸ See GREENAWALT, *supra* note 264, at 201; MIKVA & LANE, *supra* note 263, at 25-26.

²⁸⁹ See GREENAWALT, *supra* note 264, at 201; MIKVA & LANE, *supra* note 263, at 25-26.

²⁹⁰ Stempien, *supra* note 6, at 12; Bronston, *supra* note 4, at 628.

²⁹¹ 42 U.S.C. § 9601(35) (2000).

²⁹² Bronston, *supra* note 4, at 628.

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initial act of pollution.²⁹³ Moreover, a presumption exists against construing a statute or part of a statute in such a way as to render the statute or part useless.²⁹⁴ From this presumption, as well as from the inequity that would result from the elimination of the innocent landowner defense, one can conclude that Congress did not intend for passive migration to be included in "disposal."

2. Fairness Doctrine: Statute Becomes Overinclusive

Under the Fairness Doctrine, a person who merely owns property in a chain of title and who neither contributes nor benefits from the "disposal" should not be held liable for cleanup.²⁹⁵ Under the passive theory of "disposal," all parties who were owners at the time of "disposal," including those who did not affirmatively act to pollute but who merely owned while passive migration was occurring, are held liable under CERCLA.²⁹⁶ This circumstance makes CERCLA overinclusive because such parties would not normally be considered "polluters," yet they are being punished under a statute designed to hold liable only those parties responsible for pollution.²⁹⁷ This result is manifestly unfair to people who become involved with a contaminated property but who bear no responsibility for pollution.²⁹⁸

C. Problems Created by the Active Interpretation of "Disposal"

1. Frustration of CERCLA's Purpose

The passive interpretation of "disposal" is not the only theory that creates problems when analyzing CERCLA liability. The active interpretation of "disposal" also causes problems by frustrating CERCLA's purpose and by treating involved parties inconsistently.²⁹⁹ First, under the active interpretation, CERCLA liability is underinclusive, frustrating the purpose of the statute. The active interpretation encourages landowners to remain ignorant of hazardous pollution

²⁹³ *Id.*

²⁹⁴ *Bird v. United States*, 187 U.S. 118, 124 (1902).

²⁹⁵ *McMillen*, *supra* note 208, at 274.

²⁹⁶ *United States v. CDMG Realty Co.*, 96 F.3d 706, 717 (3d Cir. 1996); *see* 42 U.S.C. § 9607(a)(2) (2000).

²⁹⁷ WEBSTER'S NEW AMERICAN DICTIONARY, *supra* note 131, at 402. Pollute is defined as "to make unpure" and "to contaminate (an environment) with man-made waste." *Id.*

²⁹⁸ *McMillen*, *supra* note 208, at 274.

²⁹⁹ *See Carson Harbor Vill. Ltd. v. Unocal Corp.*, 227 F.3d 1196, 1210 (9th Cir. 2000); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844 (4th Cir. 1992).

buried on their property.³⁰⁰ Consider the following scenario. Landowner A is aware that contamination is spreading over the property through passive migration. Landowner A chooses not to try to stop the current spreading or to remedy the damage that has already been caused. Landowner A then sells the contaminated property to Landowner B. Under the active interpretation, Landowner A cannot be held liable because he did not actively place the waste into the ground, and, once the land was sold to Landowner B, Landowner A could no longer be held liable as a current owner. The active interpretation, then, does not further the purpose of CERCLA; rather, it discourages landowners from voluntarily cleaning up hazardous waste sites, and it also discourages landowners from becoming aware of what is happening to their land.³⁰¹ So long as the landowner sells the property before anyone discovers the contamination, the landowner does not have to pay for any of the costs associated with the contamination.³⁰²

The *Petersen* court attempted to downplay this argument by alleging that another section in CERCLA would act to prevent an owner from escaping liability for knowingly transferring contaminated property.³⁰³ The *Petersen* court explained that the provision would prevent owners of contaminated property from failing to disclose the contamination and that only those who were truly unaware of the contamination would be absolved from liability.³⁰⁴ Although Congress may have intended this section to protect potential buyers from such a situation, the language, structure, and placement of the provision suggest that it is not effective as a deterrent or as a liability provision.³⁰⁵ The language of § 9601(35)(C)

³⁰⁰ *Nurad, Inc.*, 966 F.2d at 845.

³⁰¹ *Id.*

³⁰² *Id.* at 845.

³⁰³ *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1353 (N.D. Ill. 1992); see 42 U.S.C. § 9601(35)(C) (2000). This section states:

Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(b)(1) of this title and no defense under section 9607(a)(3) of this title shall be available to such defendant.

Id.; see also Stempien, *supra* note 6, at 21.

³⁰⁴ Stempien, *supra* note 6, at 21; see *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1353.

³⁰⁵ Stempien, *supra* note 6, at 21.

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implies that it was only intended to affect PRPs who try to use the innocent landowner defense to avoid liability.³⁰⁶ If passive disposal does not give rise to liability, then past passive owners never become PRPs, and CERCLA cannot reach them.³⁰⁷ The language in the first sentence of the section says that the paragraph shall not diminish liability to those “otherwise liable under this chapter.”³⁰⁸ Again, if a passive past owner is not otherwise liable as a PRP, then § 9601(35)(C) cannot prevent an owner who is aware that a site is contaminated from selling the property without disclosing the contamination. This is against CERCLA’s purpose of encouraging voluntary cleanup of contaminated sites.

2. Inconsistent Treatment of Parties

Another shortcoming of the active interpretation of “disposal” is that it creates inconsistencies among parties involved with a property. The first inconsistency is between current and former owners.³⁰⁹ Under the active theory, prior owners of a property during the passive migration of waste would not be held liable because, under § 9607(a)(2), they are not owners at the time of “disposal,” but current owners would be held liable under § 9607(a)(1), even if they did not affirmatively act to create the contamination.³¹⁰ This result is inconsistent and inequitable because both the prior and the current owner were connected to the contamination only by passive migration, but the current owner remains responsible for cleanup costs, while the prior owner faces no liability.³¹¹

A second inconsistency between parties is the irrational distinction that is created between prior owners.³¹² This distinction is exemplified by the following hypothetical. Prior Owner 1 owns property where passive migration is occurring. If Prior Owner 1 is unaware that the migration is taking place, or even if he is aware and fails to act, the passive migration is not considered a “disposal,” and, therefore, Prior Owner 1 will not be held liable. On the other hand, if Prior Owner 2 owns the property at the time of “disposal,” even if he was not connected or aware of the “disposal” in any way, he will be held liable for the cleanup, along with the current owner of the property. Prior

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ 42 U.S.C. § 9601(35)(C).

³⁰⁹ See *Carson Harbor Vill. Ltd. v. Unocal Corp.*, 227 F.3d 1196, 1210 (9th Cir. 2000).

³¹⁰ See *id.* See generally 42 U.S.C. § 9607(a)(1), (2) (2000).

³¹¹ See *Carson Harbor Vill. Ltd.*, 227 F.3d at 1210.

³¹² *Id.*

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Owner 2 was no more responsible for the contamination than Prior Owner 1. In fact, Prior Owner 1 may have been more culpable for the contamination if he was aware of the migration of the waste and chose to ignore it. In any event, Prior Owner 2 will be held liable and Prior Owner 1 will not. This distinction has no basis in actual responsibility for the contamination and is, therefore, irrational and inconsistent. Both of these inconsistencies, between current and former owners, and between two prior owners, make the active theory of "disposal" an unproductive and inequitable way to determine CERCLA liability.

An analysis of both the passive and active theories of interpretation reveals that neither solves the problem of who should be held liable under CERCLA. To reach a clear and equitable solution to the question, a new vocabulary must be developed to explain the meaning of "disposal."³¹³

V. CONTRIBUTION: IS THERE AN ALTERNATIVE TO THE ACTIVE/PASSIVE INTERPRETATION OF "DISPOSAL"?

This Note proposes that there is a more effective way to look at "disposal" to determine liability under CERCLA. Because both the active and passive interpretations cause confusion, a new theory is needed to determine, in an equitable and sensible manner, what constitutes "disposal." This Note proposes a theory for determining the meaning of "disposal" that is based on the acts or omissions of a party.

The concept of act and omission was developed in tort law.³¹⁴ In this sphere, no difference exists between active misconduct that causes injury to others and passive inaction or failure to protect someone from harm.³¹⁵ The difference is that with an act, a new harm is created, whereas with an omission, the situation has not been made worse.³¹⁶

³¹³ See *infra* Part V for an alternative way to analyze the "disposal" question.

³¹⁴ This is consistent with CERCLA, which is based on nuisance law which is also a subsection of tort law. See W. PATE KEETON, PROSSER AND KEETON ON TORTS § 87 (5th ed. 1984) ("The essence of a private nuisance is an interference with the use and enjoyment of land.").

³¹⁵ *Id.* § 56; see George P. Fletcher, *Act & Crime: Act & Omission: On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1444 (1994). Omissions can be defined as an "absence of any willed bodily movements" and an action as "willed bodily movements." Fletcher, *supra*, at 1444.

³¹⁶ KEETON, *supra* note 314, § 56; see Fletcher, *supra* note 315, at 1443. Because of this difference, punishing an omission was seen as more intrusive on liberty than punishing an

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The first people held liable for omissions were those in "public" callings, or those holding themselves out to the public, because they were regarded as having undertaken a duty to serve.³¹⁷ Liability for an omission was later extended to anyone who undertook to perform for consideration and then to groups based on their relationship.³¹⁸ Generally, liability for an omission requires some relationship between the parties that imposes a duty to act.³¹⁹

In the case of CERCLA liability, by using the act and omission theory, the duty of an individual arises from his ownership of land and from the individual's knowledge that a hazardous substance has been disposed of on the land.³²⁰ Landowners have a duty of reasonableness on their land, so as not to cause any unreasonable risk or harm to others.³²¹ This duty led to the creation of nuisance law, and nuisance law led to the creation of CERCLA, which statutorily creates a duty of reasonableness.³²² Under the act and omission theory, landowners would be held liable if they acted affirmatively to create hazardous waste contamination or if they had knowledge that the contamination took place or that the waste in the land was spreading throughout the property. Using the act and omission theory to determine who is liable, and imposing this liability based on a duty created from ownership and knowledge, does not go beyond the limits or goals that CERCLA was created to enforce.³²³ In fact, this theory of determining liability under CERCLA corrects many of the problems that occur when "disposal" is interpreted in an active or passive context.

The act and omission theory corrects many of the problems created under other theories of interpretation and gives certain sections of

act. Fletcher, *supra* note 315, at 1443. Likewise, requiring particular actions is more intrusive than prohibiting actions. *Id.*

³¹⁷ KEETON, *supra* note 314, § 56.

³¹⁸ *Id.* In this relationship, the plaintiff is typically vulnerable and dependant upon the defendant who in turn holds power over the plaintiff's welfare. *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* § 57. Imposing a duty based on possession of property is not new to tort law. *Id.* The largest area where duty has operated concerns owners and occupiers of land. *Id.* This occurs because the person in possession of the land is ordinarily in the best position to discover and control its dangers. *Id.*

³²¹ *Id.* A breach of this duty can occur through intent, negligence, or strict liability. *Id.*

³²² See Keeton, *supra* note 314, § 87.

³²³ Bass, *supra* note 40, at 885. This theory is a way to accomplish the policy concerns inherent in CERCLA: "the need for effective and expeditious cleanup of hazardous waste sites to protect public health and the environment, and the need to protect the interests and legal rights of those innocent parties who may be held liable for such cleanup." *Id.*

CERCLA more force than under other interpretations. First, as mentioned before, under both the passive and active theories of migration, the courts have battled over the statutory interpretation of the words in CERCLA's liability clause.³²⁴ By using the terms "act" and "omission," the dispute disappears because both the active and passive interpretations are included, and landowners can be punished for both active and passive contamination of their land, depending upon their knowledge of the situation. Second, under the passive theory of migration, problems existed regarding the innocent landowner defense as well as the Fairness Doctrine.³²⁵ Under the act and omission interpretation, both of these problems are resolved. The innocent landowner defense is actually strengthened and made more exclusive in its applicability, which was Congress' intent when it introduced the defense.³²⁶ Congress did not want just anyone to be able to use this defense to escape liability, and, under the act and omission theory, where any knowledge of the contamination leads to liability, this goal is accomplished.³²⁷ Only those who are truly innocent landowners, with no knowledge of contamination, can employ the defense to escape liability. Also, the Fairness Doctrine looked to the ultimate fairness of the results when assigning liability. The act and omission theory is consistent with the Fairness Doctrine because only those who are responsible for the initial contamination, or those who have knowledge that the contamination is migrating, are held liable and will share in the cost of cleanup.

Additionally, the act and omission theory solves the problems that were created by the active theory of interpretation: the frustration of CERCLA's purpose and the inconsistent treatment of parties.³²⁸ The act and omission theory is more aligned with CERCLA's intentions because it punishes the polluters, both those who actively dumped the waste and those who knowingly allowed the contamination to spread. It also encourages parties to voluntarily clean up the waste. Because landowners would be aware that liability stems from their knowledge of waste migration, they would know that they would eventually be held liable for the cleanup action. The inconsistent treatment of the parties

³²⁴ See *supra* Part IV.A (discussing problems that arise through the use of statutory canons to discern legislative intent).

³²⁵ See *supra* Part IV.B (discussing problems created by the passive theory of "disposal").

³²⁶ See Bronston, *supra* note 4, at 627 (categorizing the innocent landowner defense as a narrow exemption).

³²⁷ *Id.*

³²⁸ See *supra* Part IV.C (discussing problems created by the active theory of "disposal").

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involved is also remedied because the basis for liability is the duty, based on ownership and knowledge, so there is no room to treat parties differently. Overall, the act and omission theory fixes the problems caused by both the active and passive theories and finds a way to hold responsible parties liable without frustrating CERCLA's purpose.

One way to demonstrate how this theory is different (and more effective) than existing theories is to look at a typical scenario that arises in modern passive migration cases. A landowner improperly disposes of hazardous waste and causes the property to become contaminated. A second owner then purchases the land from the first owner, uses the property for a different purpose, but does not add any additional contamination and is unaware that the original contamination exists. While the second owner is in possession of the property, contamination from the first owner begins to spread through the property via migration or leaching. The second owner then sells the property to a third owner, and the third owner is in possession of the property at the time the cleanup action begins.

Under both the active and passive theories of interpretation, the first landowner is liable because it was through that individual's affirmative conduct that the hazardous waste contaminated the property. The third owner would also be liable as a current owner of the property. Under the active theory, the second owner would not be liable as an "owner at the time of disposal" because he did not affirmatively act to add waste to the property, and the leaching of the contamination is not enough under this theory to create liability. However, under the passive theory, the second owner would be liable as an "owner at the time of disposal" because the leaching and migrating of the contamination constitutes "disposal" and, therefore, triggers liability.

Under the act and omission theory, the result would not be so rigid and would depend upon the conduct of the parties. The first owner would still clearly be liable because he was the one who introduced the contamination into the property. The third owner would also be liable as a current owner.³²⁹ But the second owner would have the ability to show whether he was in a position to control the contamination. The factors include whether or not he was aware of the contamination, what the activities on the property included, and the standard of care that was taken in researching the property before it was purchased. All of these

³²⁹ See 42 U.S.C. § 9607(a)(1) (2000) (discussing liability for the owner of a facility).

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factors would come into play in determining liability, rather than having an inflexible rule that could be both under and overinclusive. Under this scheme, parties are only held responsible if they acted to create the contamination or if they had a duty to prevent the migration of the waste.

VI. CONCLUSION

CERCLA provides protection to the public health and the environment by addressing the problem of hazardous waste disposal and holding responsible parties liable for any contamination they may cause. Though CERCLA was passed to deal with the problem of hazardous waste disposal, the language of the statute itself has caused problems of its own. Due to a lack of legislative history and an abundance of ambiguous language, CERCLA has created uncertainties among property owners as to when they will be held liable for contamination on their property.

The current scheme of analyzing the term "disposal" as either passive or active has not clarified this problem or created any certainties for landowners. Both of these interpretations create problems and inconsistencies of their own, and neither conforms with the purposes of CERCLA. By looking at "disposal," not in an active or passive sense, but by using a new vocabulary, more certainty is created for landowners. This new vocabulary, consisting of an act and omission standard, allows landowners to be aware that they will only be held liable if they breach their duty under CERCLA. This awareness and consistency in enforcement will further the goals and policies of CERCLA and give landowners peace of mind when it comes to questions of liability under CERCLA.

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* Sincere thanks to Professor Alex Geisinger for his support and for sharing his expertise and enthusiasm for Environmental Law.

